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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1953**

**No. 69**

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**DR. EDWARD A. BARSKY, APPELLANT,**

**vs.**

**THE BOARD OF REGENTS OF THE UNIVERSITY OF  
THE STATE OF NEW YORK**

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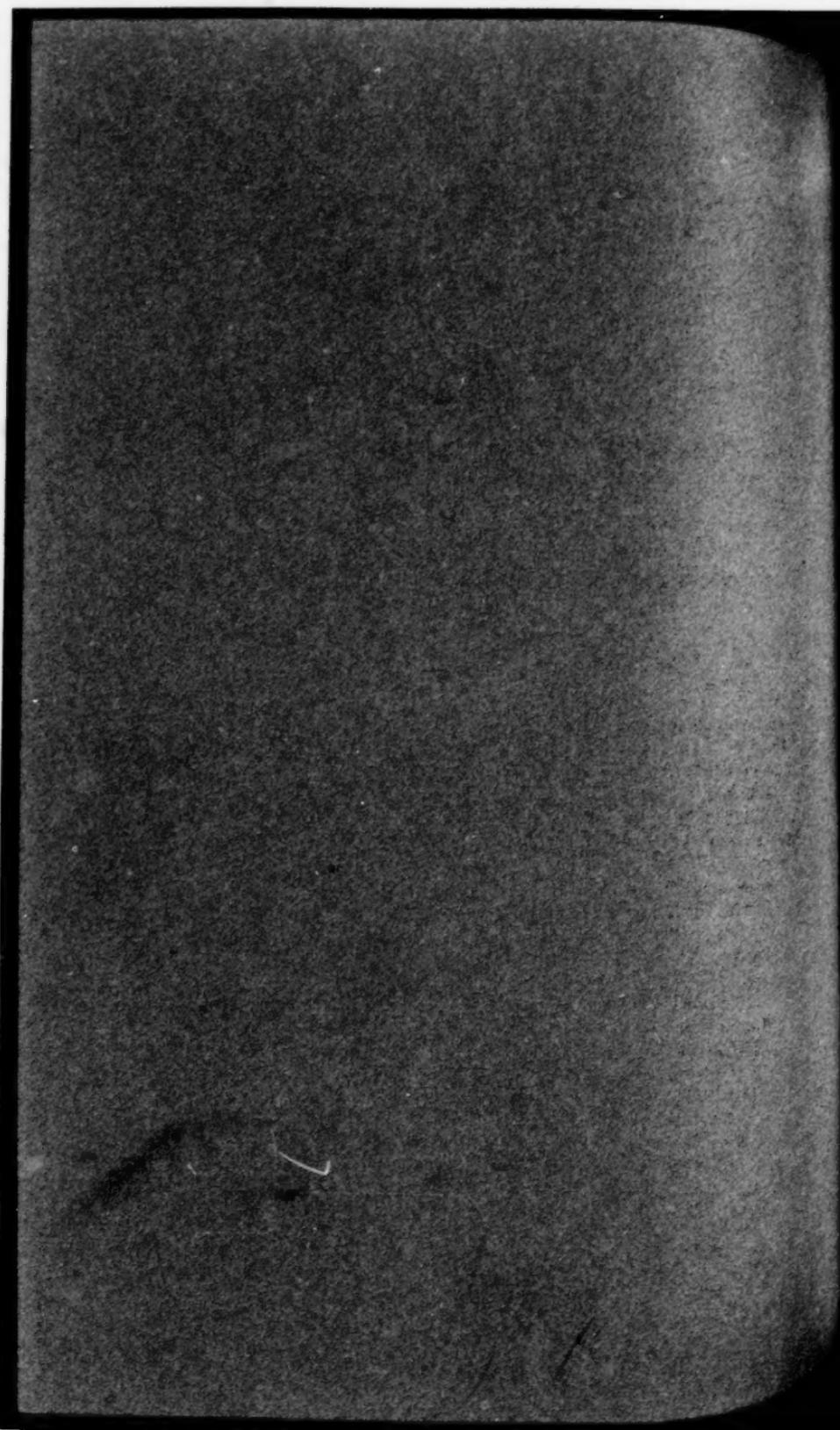
**APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK**

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**FILED MAY 12, 1953**

**Probable jurisdiction noted October 12, 1953**



# SUPREME COURT OF THE UNITED STATES

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vs.

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THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

**BEFORE THE DEPARTMENT OF EDUCATION OF  
THE STATE OF NEW YORK, COMMITTEE ON  
GRIEVANCES**

In the Matter of the Application for the Revocation of the authorization and license heretofore granted to DR. EDWARD K. BARSKY to practice medicine in the State of New York, and for the cancellation of his registration as a physician, or for such other relief as the premises warrant.

To the Department of Education of the State of New York and the Committee on Grievances appointed by the Regents in accordance with Section 6515 of the Education Law of the State of New York:

**CHARGES—April 1, 1948**

The petition of Joseph J. McCullough, a duly appointed Inspector of the Department of Education of the State of New York, respectfully shows, on information and belief, as follows:

*First:* The above-named Dr. Edward K. Barsky, herein-after referred to as respondent, graduated from the College of Physicians and Surgeons of Columbia University on February 1919, and on March 14, 1919 received license 14704 from the New York State Department of Education, which authorized him to practice medicine in the State of New York.

*Second:* Respondent maintains an office for the practice of medicine at 54 East 61st Street, in the Borough of Manhattan, County and State of New York.

*Third:* Heretofore and on or about March 31, 1947, respondent was indicted in the District Court of the United States for the District of Columbia, by the Grand Jurors thereof, duly empaneled, in an indictment which charged this respondent with the crime of contempt of the House of Representatives' Committee on Un-American Activities, in failing to produce books, ledgers, records and papers in response to a subpoena issued by authority of the House [fol. 2] of Representatives of the Congress of the United

States in a matter pertaining to an investigation then being conducted by the aforesaid Committee.

*Fourth:* That thereafter and following trial, the respondent herein was found guilty of the aforesaid crime, and on July 16, 1947, in the aforesaid court, the respondent was sentenced to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment for a period of six months in a common jail, and to pay a fine of \$500.

*Fifth:* That by reason of the foregoing, respondent has been convicted of a crime in a court of competent jurisdiction, within the purview and meaning of Section 6514, subdivision 2(b) of the Education Law of the State of New York.

*Sixth:* The sources of my information and the grounds of my belief as to the statements herein set forth on information and belief are the records of the District Court of the United States for the District of Columbia, and the records of the New York State Department of Education.

Wherefore: the authorization and license heretofore granted to Dr. Edward K. Barsky to practice medicine in the State of New York should be revoked and cancelled, and his registration as a physician should be annulled and cancelled of record, or such other and further relief as the premises warrant should be granted.

(Sgd.) Joseph J. McCullough

Dated: 1st day of April, 1948.

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[fols. 3-5] *Duly sworn to by Joseph J. McCullough: jurat omitted in printing.*

## [fol. 6] BEFORE THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK, COMMITTEE ON GRIEVANCES

[Title omitted]

AMENDED ANSWER—February 9, 1951

Respondent, for his amended answer to the petition:

1. Admits the allegations contained in paragraphs First and Second.

2. Upon information and belief, denies the allegations of Paragraph Third, except admits that in or about 1947 respondent was indicted in the United States District Court for the District of Columbia, for alleged contempt of the Un-American Activities Committee of the House of Representatives (hereinafter called the House Committee).

3. Upon information and belief, denies the allegations of paragraph Fourth, except admits that after trial in said Court, respondent was found guilty of alleged contempt and in or about July 1947, was sentenced to imprisonment for six months and fined \$500.

4. Upon information and belief, denies the allegations contained in paragraph Fifth.

5. Upon information and belief, denies the allegations contained in paragraph Sixth.

For a First Separate Defense Respondent Alleges Upon Information and Belief:

6. Jurisdiction herein is predicated upon the alleged commission of a crime within the purview and meaning of Section 6514, Subdivision 2b of the Education Law of the State of New York.

[fol. 7] 7. The alleged contempt of which respondent was found guilty in the United States District Court for the District of Columbia, was not then and is not now a crime under the laws of the State of New York, and was not and is not within the purview and meaning of Section 6514 Subdivision 2b of the Education Law of the State of New York.

8. There is no jurisdiction in the Department of Education, the Board of Regents, the Committee on Grievances or its Sub-Committee or the petitioner, to make, entertain, file, hear or to try the alleged charges herein.

For a Second Separate Defense Respondent Alleges:

9. Respondent repeats the allegations contained in paragraphs 6 through 8 with the same effect as though set forth at length.

10. Upon information and belief, the alleged contempt of which respondent was found guilty in the United States District Court for the District of Columbia, was not then, and is not now, a crime under the laws of the United States, although even if it were, jurisdiction would still be lacking by reason of the allegations contained in paragraphs 6 through 8 of this answer.

For a Third Separate and Distinct Defense Respondent Alleges Upon Information and Belief:

11. Sections 6514 and 6515 of the Education Law of New York State are unconstitutional and violate the Federal and State Constitutions. They contain and constitute an unlawful delegation and abdication of legislative power and function to, and the Legislature set up no guides or standards for the conduct of the Department of Education, the Board of Regents, the Committee on Grievances, or its Sub-Committee, or for any other body, in connection with the [fol. 8] punishments to be imposed for the infractions set forth in Section 6514, thus permitting unlimited, arbitrary, capricious and discriminatory action by said bodies.

12. Further, said sections are contradictory, vague, uncertain and indefinite and fail to establish an ascertainable standard of guilt or of punishment and violate the Federal and State Constitutions.

13. In the Penal Law and elsewhere, the Legislature, in pursuance of its legislative function and power, set forth definite ranges of punishment for each crime and for each degree of the same crime. The same is true in other statutes imposing penalties or punishments for other offenses. In Sections 6514 and 6515, however, the Legislature abandoned and delegated this function and power to the Department of Education, the Board of Regents, the Committee on Grievances and its Sub-Committee, which have unlimited and arbitrary power to impose any punishment from reprimand to revocation of a medical license upon a physician, as they in their sole and unlimited discretion see fit, irre-

spective of the nature of the crime or the offense or the infraction involved, and irrespective of the degree of the crime or the offense, and irrespective of its relationship to the practice of medicine or to the presence or absence of moral turpitude.

14. Said mentioned bodies have it within their power to legislate, to do so in a discriminatory and arbitrary manner, to impose arbitrary and discriminatory punishment, and in fact to reverse the legislative intent and the degree of punishment indicated by the Legislature in the Penal Code and elsewhere. For example, said bodies might, if said sections are valid, impose upon one physician, a mere reprimand for a heinous first degree assault, while they might impose upon another physician complete revocation of his license for a third degree assault; they might impose a mere reprimand [fol. 9] or short suspension upon one physician for the performance of abortions or for selling narcotics, while they might discriminate against another physician by arbitrarily imposing a harsher punishment for a non-medical infraction that has no moral turpitude.

15. Irrespective of whether said bodies have exercised their powers in a reasonable fashion, nevertheless if said sections are valid, said bodies do have these legislative functions and they do have the power to act in an arbitrary and discriminatory manner without any guideposts or standards to circumscribe and guide their actions or to circumscribe their unlimited power. Once the power exists, the sections are invalid irrespective of how the bodies do act. The sections are therefore unconstitutional.

**For a Fourth Separate Defense Respondent Alleges Upon Information and Belief:**

16. Sections 6514 and 6515 of the Education Law of New York, as applied to the facts of this case, violate the Federal and State Constitutions, the due process of law provisions thereof, are discriminatory against all physicians including respondent, constitute class legislation, and violate the public policy and sovereignty of New York State.

17. Said sections, as applied to the facts of this case, purport to seek to punish respondent and to endanger respondent's New York license to practice medicine, issued to

respondent, a New York Resident, by reason of an alleged contempt committed outside of New York. Said alleged contempt was not and is not a crime under the laws of New York. It was not and is not connected with respondent's practice of medicine. Said sections, as thus applied to the facts of this case, purport to attempt to give to the New York Department of Education, the Board of Regents, the [fol. 10] Committee on Grievances and its Sub-Committee, power to punish physicians including respondent, for an alleged contempt committed elsewhere that is not a crime in New York, a power which not even the New York Courts have. Said alleged contempt, not being a crime in New York, would not result in any punishment of or disqualification against any persons in New York other than physicians. Said sections, as so applied to the facts of this case, are discriminatory and class legislation, violates the Federal and State Constitutions and the due process clauses thereof.

18. To give extra-territorial effect to a conviction in another jurisdiction for an alleged contempt that is not a crime in New York, violates the sovereignty and the public policy of New York and the decisions of the New York Courts. If permitted in this case, it would be discriminatory against all physicians including respondent; it would be class legislation, and violative of the Federal and State Constitutions and the due process clauses thereof.

**For a Fifth Separate and Distinct Defense, Respondent Alleges:**

19. The Joint Anti-Fascist Refugee Committee (hereafter referred to as the Organization) came into existence in about 1942, and was, prior and subsequent to April 1946, a completely philanthropic organization, devoted to the raising of funds and to the disbursing thereof for the benefit — the thousands of men, women and children who became refugees following the war in Spain, and were confined in concentration camps, were homeless, wounded or ill, and were in dire need of medical care, hospitalization, food, clothing, shelter and relief.

20. At all the times mentioned, said organization disbursed its funds for medical aid, hospitalization, food,

[fol. 11] clothing, shelter and relief and for the care of said victims, and maintained two hospitals, a home for children, and a rest home in France and Mexico; it further provided assistance for said refugees in Switzerland, Portugal, North Africa, the Dominican Republic and elsewhere; it still further provided transportation for said refugees to those countries that offered them asylum.

21. At all the times mentioned, the Franco regime in Spain was universally condemned by the United States and the governments of the United Nations.

22. At all the times mentioned, said Organization was a recognized "war relief" organization; it had been approved and licensed by the President's War Relief Control Board; it rendered regular reports to said President's War Relief Control Board; it furnished all the information called for by said Board; and it received complete tax exemption as a charitable organization from the Treasury Department.

23. The efforts of said Organization were sponsored and supported by most eminent persons throughout the United States and throughout the rest of the world, from all walks of life and all professions, including the medical profession.

24. Said Organization had an Executive Secretary, who received a salary, and who always had custody, possession and control of the books and records of the Organization and who was responsible for the functioning of the Organization.

25. Respondent became National Chairman of said Organization in or about 1942.

26. At no time did respondent receive any remuneration, salary or anything else, directly or indirectly from or through said Organization, but acted in a purely voluntary capacity.

[fol. 12] 27. Respondent, a practicing surgeon, a physician of some 30 years standing, gave as much of his time and efforts as he could, compatible with his active practice, in an endeavor to aid the aforementioned completely charitable efforts of said Organization, and to help the unfortunate victims it sought to succor. In addition to these efforts, respondent made substantial monetary contributions to aid said refugees.

28. After said Organization had been so licensed by the

President's War Relief Control Board, and while it made regular reports to said Board and functioned as a charitable organization, the aforementioned House Committee, (whose aims and methods were the subject of nation-wide condemnation, including condemnation by the President of the United States, condemnation on the floor of Congress and in other responsible quarters), did attempt, on or about December 1, 1945, and without any notice to said Organization and behind its back, to have the organization's license revoked by the said President's War Relief Control Board. This, the President's War Relief Control Board, refused to do.

29. At no time prior or subsequent to its aforementioned attempt to revoke the Organization's license on about December 1, 1945, did the House Committee invite or call upon said Organization to explain its activities. At no time did the House Committee call upon said Organization to refute the unfounded, hearsay claims, made by persons who had never been connected with said Organization. On the contrary, the only persons invited before said House Committee in connection with the work of said Organization, were persons who had never been associated with it, and who knew nothing about it, but who were used as pawns to aid the House Committee express its own bias, prejudice and hostility.

[fol. 13] 30. After said House Committee had clearly indicated its extreme and unfounded hostility and prejudice against said Organization, the said House Committee, in an obvious attempt to do harm to said Organization and to its contributors and to the recipients of its charity, demanded that said Organization deliver to it the names of its contributors and the names of the recipients of its charity.

31. Upon information and belief, this demand violated the traditional, accepted practices of all fund-raising organizations, all of whom keep the names of their contributors, and the names of the recipients of their charity, completely confidential.

32. Thereafter, the House Committee, in a hostile and prejudicial endeavor to obtain the names of the contributors and the recipients of the Organization's charity, served a subpoena therefor, on the said Executive-Secretary.

33. Despite the fact that the House Committee knew that the said Executive-Secretary had custody, possession and control over said books and records, it served respondent with a similar subpoena although it knew respondent did not have custody, possession or control over said books.

34. The Executive Board of said Organization voted not to authorize the transfer of the custody of the books and records of said Organization from its Executive Secretary to the respondent, and prohibited said transfer. The Executive Secretary, the recognized custodian of said books and records, had already been served with a subpoena therefor.

35. At no time did respondent have either custody or possession or control of the books and records so subpoenaed for production before the said House Committee.

36. It must be noted that among the contributors to said Organization, were Americans of Spanish descent, with [fol. 14] families still in Spain. Among the recipients of its charity, were Spaniards who also had families in Spain.

37. To reveal to this prejudiced, hostile House Committee, the names of the contributors to said Organization and to reveal to it the names of the recipients of its charity, would have exposed these families to reprisals by the Franco regime in Spain, including the definite danger of imprisonment and execution.

38. Said Organization being faced with this grave problem and responsibility, sought legal advice. Respondent also sought legal advice as to the subpoena served upon him for the books and records of which he had no custody, possession or control.

39. The Organization and respondent received legal advice that the aforementioned demands and said subpoenas of said House Committee, were unconstitutional and void. This was an opinion widely held throughout the country by eminent lawyers, and in responsible legal and other quarters. This opinion was also held by the dissenting Judge of Circuit Court of Appeals before whom this issue came on appeal. It is also to be noted that two Justices of the United States Supreme Court voted to grant respondent a review of his case.

40. To indicate its good faith and to indicate its earnest and well-founded belief of the hostility of and the harm in-

tended by said House Committee, said Organization publicly printed a financial statement of its affairs, and publicly invited and offered to permit any impartial group of Americans, other than said prejudiced, harm-seeing House Committee, to inspect its books and records. In addition, the Organization invited further investigation by the President's War Relief Control Board.

[fol. 15] 41. In his appearance before the House Committee and his testimony there, respondent answered all questions asked of him.

42. Respondent at no time intended to act in contempt of the Committee or to commit any offense, and at all times was acting in the best of good faith, and in accordance with the advice of legal counsel.

43. Although respondent never profited in any manner in his connection with said Organization, and although respondent acted according to the dictates of his own conscience and on legal advice and according to the highest standards of the medical profession in protecting those to whom respondent felt he owed a duty of trust, to protect the contributors from financial and other harm, and to protect the said families of contributors and of the recipients of said charity from imprisonment and execution, respondent was found guilty of alleged contempt. Respondent earnestly feels and states that he was not guilty of said alleged contempt.

44. On appeal, one of the Three Judges agreed with respondent, and deemed the actions of the House Committee utterly unconstitutional.

45. Thereafter on a petition for review to the United States Supreme Court, said Court did not render a decision for some two years, and even then, when said review was denied, two Justices of the United States Supreme Court voted to grant respondent a review. Upon information and belief, the fact that the Supreme Court denied review, does not mean it passed upon the merits, or that it agreed with the two-to-one decision below, or that it approved of the conviction.

46. Thereupon, respondent, who had never been convicted of any offense whatsoever, who had never even been charged [fol. 16] with any offense whatsoever, and who has never

been charged with any infraction before this body, suffered the indignity, the physical and mental anguish of actual physical imprisonment and confinement for 5 months.

47. Respondent was confined in an institution far away from his wife and child; he was permitted two visiting hours a month; he lost twenty-three pounds during his imprisonment; he lost five months away from his practice; he had to maintain his office in the interim so as not to lose his practice and he was forced to deplete his savings to continue to maintain his family and his office.

48. Respondent submits that in acting in a voluntary capacity in connection with said Organization, he participated in the alleviation of pain and suffering of human beings, without thought of compensation and without ever receiving any. In so doing, he feels he acted in the best traditions of his profession and in the spirit of the oath of Hippocrates.

49. Respondent has submitted the foregoing in some detail, in the firm belief that aside from what he understands to be the lack of legal basis for the charges herein, as aforementioned, respondent seriously doubts whether the Department of Education, the Board of Regents, the Committee on Grievances, or its Sub-Committee, or the Secretary of the Grievance Committee or the petitioner, would ever have filed or entertained these charges against respondent, had they really been aware of the true facts of this situation.

50. Respondent asserts that his conduct is compatible with the highest standards of the medical profession. Respondent seriously doubts whether any member of any of the bodies aforementioned, if similarly associated with any charitable organization and if faced with the trust and [fols. 17-25] the fate of the contributors to said Organization and their families, and the trust and the fate of the victims aided by said Organization and their families, would or could have done otherwise in the dictates of good conscience.

Wherefore respondent prays that the petition be dismissed. Respondent further prays that he be relieved from any possible odium that may attach by reason of the mak-

ing of the charges against him and that appropriate exonerations be noted on the record herein.

Dated: New York, February 9, 1951.

(Sgd.) Edward K. Barsky.

*Duly sworn to by Edward K. Barsky. Jurat omitted in printing.*

[fol. 26] IN SUPREME COURT OF NEW YORK, SPECIAL TERM,  
COUNTY OF ALBANY

ORDER TRANSFERRING PROCEEDING TO APPELLATE DIVISION,  
THIRD DEPARTMENT—November 8, 1951

Upon the annexed affidavit of Abraham Fishbein duly sworn to, the petition herein verified October 23, 1951, the order to show cause dated October 29, 1951 from which it appears that petitioner, on October 29, 1951, commenced a proceeding in the Appellate Division, Third Department, pursuant to Article 78 C. P. A. and Section 6515 of the Education Law for an order annulling the determination of the Board of Regents suspending petitioner's license to practice medicine for six months, and on the consent at the foot hereof, it is

Ordered that the above proceeding commenced by petitioner in the Appellate Division, Third Department, on October 29, 1951 by the petition of the petitioner in that Court verified October 23, 1951 is hereby deemed such a proceeding in the Supreme Court, Albany County, nine pursuant as of October 29, 1951, and it is further

Ordered that said petition of petitioner is hereby amended to read "Supreme Court, Albany County" instead of "New York Supreme Court: Appellate Division, Third Judicial Department," and it is further

Ordered that subsequent to the service upon respondent of a copy of this order with notice of entry, respondent file [fol. 27] its answer to the petition and make a complete return herein, in the said Appellate Division, Third Department, and it is further

Ordered that this matter is transferred to the Appellate

Division, Third Department, for appropriate review under Article 78 of the C. P. A. and Section 6515 of the Education Law of the determination, action and order of the respondent, in connection with the matters set forth in said petition and for a review of the respondent's order dated October 5, 1951 suspending petitioner's license to practice medicine and his registration as a physician for six months and that the parties proceed accordingly.

Enter, Isadore Bookstein, J. S. C.

Entry of the above order is consented to.

Abraham Fishbein, Attorney for Petitioner. Nathaniel L. Goldstein, Attorney General, Attorney for Respondent.

[fol. 28] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY  
PETITION FOR REVIEW—October 23, 1951

The petition of Dr. Edward K. Barsky respectfully shows to this Court as follows:

I. Petitioner was graduated from the College of Physicians and Surgeons of Columbia University in February 1919. On or about March 14, 1919, he received license No. 14704 from the New York State Department of Education which authorized him to practice medicine in the State of New York.

II. Petitioner maintains an office for the practice of medicine at 54 East 61st Street, Borough of Manhattan, City and State of New York.

III. Petitioner is a physician and surgeon, and has been practicing surgery for about thirty years.

IV. On or about April 1st, 1948, one, Joseph J. McCullough, an Inspector of the Department of Education of the State of New York, presented a petition and charges to said Department of Education and its Committee on Grievances, seeking the revocation of petitioner's license to practice medicine and for the cancellation of his registration as a physician.

V. Said petition was based upon the charge that after a trial in the U. S. District Court for the District of Columbia,

your petitioner was found guilty, on July 16, 1947, of failing to produce books before a House of Representatives Com-[fol. 29] mittee, and was sentenced to six months imprisonment and was fined \$500. By reason thereof, the said Department of Education Inspector concluded that petitioner had been convicted of a crime within the meaning of Section 6514, subdivision 2b, of the Education Law of the State of New York.

VI. Petitioner interposed an answer in substance as follows:

(a) That the offense of which he had been convicted is not a crime under the laws of New York, does not come within Section 6514 2b of the Education Law, and therefore jurisdiction is lacking on the part of the respondent.

(b) That the offense is not a crime under the laws of the United States.

(c) That Sections 6514 and 6515 of the Education Law violate the Federal and State Constitutions and are also unconstitutional as applied to the facts of the case, all as set forth in detail in said answer.

(d) The answer further sets forth the following (which was proved on the hearing and which was not controverted by any testimony whatsoever) :

1. The Joint Anti-Fascist Refugee Committee (known as the Organization) came into existence in about 1942 and was at all times completely philanthropic in nature. It was devoted to the raising and disbursing of funds for the benefit of the thousands of men, women and children who became refugees following the war in Spain, and were confined in concentration camps, were homeless, wounded or ill, and [fol. 30] were in dire need of medical care, hospitalization, food, clothing, shelter and relief.

2. The Organization also maintained two hospitals, a home for children and a rest home in France and Mexico. It also provided assistance for these refugees in Switzerland, Portugal, South Africa, the Dominican Republic and elsewhere, all without any discrimination whatsoever as to race, color, creed or belief. (In fact the actual disbursing of the funds was done through organizations like the Unitarians, or the Board of Christian Missions.)

3. The Organization was a recognized war-relief organization and had been approved and licensed by the President's War Relief Control Board. It rendered regular reports to said Board and furnished all the information called for and had received tax exemption as a charitable organization from the Treasury Department.

4. The efforts of the Organization were sponsored and supported by most eminent persons throughout the United States and the rest of the world, from all walks of life and professions, including the medical profession.

5. The Organization had an executive secretary who received a salary and who always had custody, possession and control of its books and records and who was responsible for the functioning of the Organization.

6. Petitioner became national chairman of the Organization in or about 1942. At no time did he receive any remuneration, salary or anything else. He acted purely in a [fol. 31] voluntary capacity. Petitioner, a practicing surgeon and physician of some thirty years standing, gave as much time as he could, compatible with his active practice, in an endeavor to aid the charitable efforts of the Organization. He also made monetary contributions to aid the victims it sought to help.

7. On about December 1, 1945, the House Un-American Activities Committee, without any notice to the Organization and behind its back, attempted to have the Organization's license revoked by the President's War Relief Control Board, but the Board refused to do so.

8. The said House Committee and its aims and methods were, at the time, the subject of nationwide condemnation, including condemnation by the President of the United States, condemnation on the floor of Congress, and in other responsible quarters. (The Attorney General formally conceded this claim, as will be pointed out later on.)

9. At no time prior to its attempt to revoke the Organization's license, did the House Committee ever notify or call upon the Organization to explain its activities nor did it ever offer an opportunity to the Organization to refute the unfounded, hearsay claims made by persons who had never even been connected with the Organization.

10. After it had clearly indicated its unfounded hostility

to and prejudice against the Organization, the said House Committee in an obvious attempt to harm the Organization and the contributors thereto and the recipients of its charity, demanded that the Organization deliver to it the names of [fol. 32] its contributors and the names of the recipients of its charity, and the said House Committee served a subpoena therefor on the executive secretary.

11. Despite the fact that the House Committee knew that the executive secretary had custody, possession and control of the books, it served petitioner with a similar subpoena although it knew he did not have custody, possession or control of the books.

12. The executive board of the Organization voted not to authorize the transfer of the custody of the books from its executive secretary to the respondent, and prohibited that transfer. (One of the thoughts was that since the executive secretary had already been served with a subpoena for these books, any transferring of custody, possession or control from the recognized custodian, would obviously appear to be an attempt to evade the subpoena served on the executive secretary.)

13. In addition to his lack of custody, possession or control of the books, petitioner pointed out that among contributors to the Organization were Americans of Spanish descent with families still in Spain, and among the recipients of its charity were Spaniards who also had families in Spain, and that to reveal to this hostile House Committee these names would have exposed these families to reprisals by the Spanish regime, including the definite danger of imprisonment and execution.

14. The Organization and petitioner thereupon sought legal advice and they were advised by a firm of reputable attorneys that the demands and subpoenas of the House Committee were unconstitutional and void. This was an [fol. 33] opinion widely held at the time throughout the country by eminent lawyers and in responsible legal and other quarters (as the Attorney General formally conceded), and it was the opinion held by the dissenting Judge of the Circuit Court of Appeals before whom this issue came on appeal. Two justices of the United States Supreme Court voted to grant petitioner a review.

15. To indicate its good faith and its earnest belief of the pre-judgment and the hostility and the harm intended by the House Committee, the Organization publicly printed a financial statement of its affairs and publicly invited and offered to permit any impartial group of Americans other than this prejudiced House Committee to inspect its records and also invited further investigation by the President's War Relief Control Board.

16. In his appearance before the House Committee and his testimony there, petitioner answered all questions asked of him. He did not refuse to answer any questions.

17. Petitioner at no time intended to act in contempt of the Committee or to commit any offense, and at all times acted in the best of good faith and in accordance with the advice of legal counsel.

18. Despite the fact that petitioner profited in any manner in his connection with the Organization and although he acted according to legal advice and the dictates of his conscience and according to the highest standards of the medical profession in protecting those to whom he owed a duty of trust, respondent was found guilty of wilfully failing to produce records of which he never had custody. (At [fol. 34] the same time an acquittal was ordered by the Court as to that count dealing with conspiracy to commit a wilful default.)

19. On appeal, one of the three Judges agreed with petitioner and deemed the actions of the House Committee utterly unconstitutional. On a petition for review to the United States Supreme Court, a decision was not rendered for some two years and then when review was denied, two Justices of the United States Supreme Court voted to grant petitioner a review.

20. Thereupon petitioner, who had never been charged or convicted of any crime, or any infraction before the Medical Grievance Committee, suffered the indignity, the physical and mental anguish of actual physical imprisonment and confinement for five months.

21. Petitioner was confined in an institution far away from his wife and child, was permitted two visiting hours a month, lost twenty-three pounds during his imprisonment, lost five months away from his practice (amounting to an

actual five months suspension), had to maintain his office in the interim so as not to lose a practice established for some thirty years, and was forced to deplete his savings to continue to maintain his family and his office.

22. Petitioner submitted the foregoing answer in detail in the belief that aside from what he understood to be the lack of legal basis for the charge herein, petitioner doubted whether the Board of Regents or the Medical Committee on Grievances or any other body or person would ever have [fol. 35] filed or entertained these charges against him had they really been aware of the true facts of this situation (none of which came out on the trial of the petitioner on the advice of legal counsel, because the basic issues submitted to the Court and jury were the legality and constitutionality of the subpoena so served upon him).

23. In concluding his answer, petitioner asserted that his conduct was compatible with the highest standards of the medical profession and he seriously doubted whether any member of the Board of Regents or the Medical Committee on Grievances, if similarly associated with a charitable organization, and if similarly faced with the trust and the fate of its contributors and their families, and the trust and fate of the victims aided by the Organization, and their families, would or could have done otherwise in the dictates of good conscience.

VII. After the joinder of issue, and on or about February 15 and April 12, 1951, hearings were held upon said charge before a sub-committee of the Committee on Grievances, whereat petitioner moved to dismiss the petition and charge for lack of jurisdiction and on the other legal bases set forth in his answer. After the motion was denied, a hearing was held at which testimony was adduced, exhibits were introduced, witnesses were heard, and the hearing was finally closed.

VIII. The sole testimony offered in support of the Inspector's charge, was the conviction. At no time was any testimony offered to refute any evidence or any of the exhibits offered by your petitioner or his witnesses.

[fol. 36] IX. Thereafter and on or about April 5, 1951, a report containing findings, a determination and a recommendation, was rendered by said subcommittee of the Com-

mittee on Grievances of the Department of Education of the State of New York. Said report concluded with a recommendation that petitioner's license to practice medicine should be suspended for three months.

X. Thereafter the Secretary of the Committee on Grievances made a certificate to the Board of Regents to the effect that by a vote of six to four, the full Committee on Grievances recommended a suspension of six months and not three months as recommended by the sub-committee that conducted the hearings. Four members had voted for a three months suspension, instead of a six months suspension, according to said certificate.

XI. Thereafter a hearing was held on July 11, 1951 before the Committee on Discipline of the Board of Regents, at which oral argument was presented by counsel for your petitioner and by the Attorney General of the State of New York, and at which your petitioner also made an oral statement.

XII. Thereafter and on or about July 31, 1951, the said Committee on Discipline rendered a twenty-eight page report which concluded as follows:

(a) That the legal issues presented by your petitioner raised a substantial question of law which could only be determined by the Court and that jurisdiction should be taken by the Board of Regents to permit the Court to pass upon said legal issues.

[fol. 37] (b) The said Committee further concluded that an examination of the record and other pertinent material shows no legal evidence to support any finding of conduct on petitioner's part to justify discipline beyond the minimum. Accordingly said Committee stated:

"We therefore conclude that he should be censored and reprimanded, and no more."

XIII. Because of its bearing on this application, petitioner sets forth a number of excerpts from said report:

"There remains, however, the major argument advanced by Respondent's counsel, which does raise a substantial question as to the proper interpretation of the words 'a crime' in sub-division 2(b) of Section 6514

of the Education Law. That argument is (1) that the statute applies to a conviction 'without this state' only if the offense is a crime under the New York law, and (2) that contempt of Congress is not such an offense.

"The first branch of this argument finds support by analogy in decisions of the New York courts. We know of no decision, however, which is precisely in point; and, since the question is one of statutory interpretation, a decision interpreting a different statute or instrument in different circumstances cannot finally determine the question."

\* \* \* \* \*

"the Supreme Court of the United States has said that [fol. 38] 'no moral turpitude is involved' in violation of the Federal statute under which Respondent has been convicted."

\* \* \* \* \*

"In any event, the various questions discussed above cannot be authoritatively answered until the courts have spoken; and they are at least close enough to require, in our view, that the Board of Regents assert its jurisdiction under the disciplinary statute. A decision by the Board of Regents against its own jurisdiction would remove the questions from consideration by the courts; and we do not believe that they should be so removed."

\* \* \* \* \*

"We have noted above (page 13) that violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude. We find on examination of the record and of the other material that we have examined no legal evidence to support any findings of conduct on Respondent's part (apart from the inherent nature of the crime of which he has been convicted) that would justify discipline beyond the minimum. We therefore conclude that he should be censured and reprimanded, and no

more. We proceed to discuss the grounds of this conclusion."

\* \* \* \* \*

"The issues litigated at the criminal trial were primarily issues of law."

\* \* \* \* \*

"It is clear on the record of the criminal trial as a whole that, the constitutional and legal defense having [fol. 39] been decided as a matter of law against the defendants, and the issues for the jury's consideration being limited as a matter of law as we have noted above, there was no ground on which the jury could properly have acquitted the defendants (except perhaps under the instruction that evidence of good character might be sufficient to create a reasonable doubt)."

\* \* \* \* \*

"It thus appears that (apart from the inherent nature of the crime of which Respondent was convicted, which we have seen to be negative in so far as the imposition of more than minimum discipline is concerned) nothing was adjudicated in the criminal trial which would in itself justify imposition of more than the minimum discipline. We turn, therefore, to a consideration of the other evidence, including evidence (not material in the criminal trial) offered by Respondent here in explanation of the conduct that led to his conviction."

\* \* \* \* \*

"We have noted above that Respondent's motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here. In considering those motives and reasons, as stated in Respondent's Exhibits CC and GG and in Respondent's testimony, we must do so in the light of certain concessions which the Attorney General has made on the present record.

[fol. 40] "There were, first, concessions with regard to the reasonableness of the legal advice which Respondent received from his counsel, that there were valid constitutional and other legal objections to the subpoenas. The Attorney General formally conceded that Respondent 'was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them'; that the opinion on the constitutional question held by Respondent's counsel 'was held by many lawyers and some jurists'; that there were 'expressions in some legal journals' that the subpoenas were illegal; and that such an opinion was held by one of the judges of the Court of Appeals before which the case came up on appeal. Later the Attorney General stated:

'I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part';

and again:

'I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable.'

"Second, as bearing on the motives of Respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney General made the following concession:

[fol. 41] " \* \* \* I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the conduct of the House Committee on Un-American Activities at the time.'

(The Attorney General conceded further that Congressmen were included among the "people of prominence" who held such views, and that there were Congressmen who at that time made speeches "against the activities of (the Congressional Committee), against its procedure and otherwise".)

"The principal reasons given by Respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement [fol. 42] of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad', and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945, asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and pre-judgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined by the courts.

"If these views were honestly held and these asser-

tions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are [fol. 43] raised (*Sinclair v. United States*, *supra*). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis.

"A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But there is no such evidentiary showing. \* \* \* conjecture cannot take the place of evidence."

\* \* \* \* \*

"Having mentioned grounds of conjecture to the disadvantage of Respondent's position, a proper balance requires that we mention briefly also, by way of example, some of the evidence that tends to support his position. There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by [fol. 44] the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. \* \* \* There is evidence also in Respondent's

Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board, did in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.

\* \* \* \* \*

"We disagree with the Attorney General's position, stated here and elsewhere and reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced.

"Since violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation [fol. 45] (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that Respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded.

Respectfully submitted, Robert M. Benjamin  
John L. Bauer, M. D., Susan Brandeis.

Regents' Committee on Discipline.

July 31, 1951"

XIV. Thereafter and on or about October 18, 1951, petitioner's attorney received by mail, a copy of said

report of the Committee on Discipline, together with a notice that on September 28, 1951 the Board of Regents (which did not hear the evidence or the witnesses or counsel) had accepted and sustained the determination of the Medical Committee on Grievances (which likewise did not hear the evidence or the witnesses or counsel); and had voted to suspend petitioner for six months. (This rejected the detailed and considered report and recommendation of its own Committee on Discipline.)

XV. Petitioner has been informed that such an order of suspension was issued although not yet served against him.

[fol. 46] XVI. Petitioner is informed and believes that the determinaiton of the Board of Regents is final and binding and that the Board of Regents is not expressly authorized by statute to re-hear the matter upon petitioner's application and that the rules of the Board of Regents do not provide for a rehearing.

XVII. Your petitioner is very seriously aggrieved. The finding of guilt against petitioner and the suspension administered to him, are, he submits, without legal basis and are unwarranted, unfair, unjust, illegal and contrary to all the competent and credible evidence adduced upon the hearing, especially since no testimony was presented against petitioner except the foreign conviction. There was no basis or evidence in law or in fact to justify or to sustain the charge or suspension against your petitioner. Upon the entire record, the findings and determination of the Medical Grievance Committee and of the Board of Regents, are erroneous in law and in fact, and said findings, determination and suspension are arbitrary and capricious, made without regard to the law, the evidence and the record. The proceedings were conducted with prejudice to petitioner. Errors of law and fact were committed in said proceedings. Petitioner wishes a review by this Court of all questions mentioned in Section 1296 of the Civil Practice Act.

XVIII. Petitioner is informed that a principal, if not the sole basis of the findings, determination and suspension of the Medical Grievance Committee and Board of Regents, was held by the United States Supreme Court and by other

courts thereafter, to be reversible error as a matter of law. [fol. 47] XIX. Petitioner is informed and believes that he is entitled to review of said determination of the respondent as a matter of right, in accordance with the provisions of Section 6515, subdivision 5, of the Education Law.

XX. In view of the fact that the Committee on Discipline of the Board of Regents found that there were substantial questions of law to be decided by the Court, and further in view of the fact that said Committee on Discipline stated that on the basis of the record nothing but a minimum punishment, namely a censure and reprimand, were warranted, and further in view of the fact that at no time has there been any claim made that the offense of which petitioner was convicted is in any manner connected with the practice of medicine, petitioner requests a stay to permit of judicial determination of all the foregoing. If no stay were granted, the petitioner would be gravely and irreparably injured because he would be suspended for six months and his legal proceedings in the interim would thereby be rendered meaningless, especially because it will take at least six months to determine the issues herein.

XXI. Petitioner seeks review under Section 1296 C. P. A., subdivisions 2 through 7, with the same effect as though he set forth and repeated each of said subdivisions and alleged it was applicable here. Petitioner also specifically raises the questions in subdivisions 6 and 7 of Section 1296, and seeks a determination that there was no competent proof of all the facts necessary to be proved in order to authorize the making of the determination; further that upon all the evidence there was such a preponderance of proof against [fol. 48] the existence thereof, that a verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court triable by a jury, would be set aside by the Court as against the weight of evidence.

XXII. No prior application was made for this order.

Wherefore petitioner prays for a review under Article 78 of the Civil Practice Act of the determination and action of the Board of Regents of the University of the State of New York suspending him for six months; that an order be made staying all proceedings on the part of the respondent,

the Commissioner of Education, their attorneys, agents, servants and employees from enforcing said determination and order; and that a further order be made requiring respondent to file its answer and to make a full and complete return before this Court to the end that this Court on such review, may annul the said determination and order of the Board of Regents; and petitioner seeks such other and further relief as may be proper.

Dated: New York, October 23, 1951.

Edward K. Barsky.

(Sworn to and verified October 23, 1951.)

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[fol. 49] ORDER OF SUSPENSION—October 5, 1951

The University of the State of New York

Upon the records, findings and determination of the Medical Committee on Grievances, after due notice and hearing, and pursuant to the vote of the Board of Regents had and taken September 28, 1951; it is

Ordered, That the determination of the Medical Committee on Grievances be accepted and sustained, and that, in compliance with the recommendation of said Committee, medical license No. 14704, issued under date of March 14, 1919, to Edward Barsky, permitting him to practice medicine in the State of New York, and his registration or registrations as a physician, wherever they may appear, be and the same hereby are suspended for a period of six months from the date of service of this order.

In Witness Whereof, I, Lewis A. Wilson, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 5th day of October, 1951.

Lewis A. Wilson, Commissioner of Education.  
(Seal.)

[fol. 50] IN SUPREME COURT OF NEW YORK

ANSWER AND RETURN—November 1, 1951

The above named respondent, by the undersigned Attorney General, hereby answers the Petition herein, as follows:

1. Admits the allegations of paragraphs I to V inclusive of the Petition, and also of paragraphs VII, IX, X, XI, XIV, XV, XVI, XIX, XXI and XXII.

2. The answer mentioned in paragraph XI, which purports to state its "substance" at typewritten pages 2-8 of the Petition, is part of Exhibit I copied in the Hearing Minutes. The statement of the Petition is admitted insofar as it is confirmed by the answer, and otherwise is denied.

3. The allegations of paragraph VIII about the testimony on the Hearings are denied. The respects in which the allegations are false can be deduced from the Hearing Minutes which are returned hereby.

4. The twenty-eight page report mentioned in paragraphs XII and XIII, which purports to summarize the same and quote excerpts from it, is returned hereby. The allegations of those paragraphs are admitted insofar as they are confirmed by the report, and otherwise are denied.

5. The allegations of paragraphs XVII, XVIII and XX are denied. However, they tender only issues of law, which are submitted to the courts.

As a further Answer to the Petition, and as a Return of its proceedings herein, the Respondent hereby certifies and [fol. 51] returns the following documents:

A. The stenographic record of Hearing Minutes. These are not physically annexed to this Answer and Return, or to the copy of it served on the Petitioner's attorney, because they are very bulky, about 465 pages, and it is understood that the Petitioner's attorney has a copy.

B. The Exhibits on such hearing, about forty-one in number. These likewise are not physically annexed hereto. Subject to the approval of the courts, there appears to be no necessity for printing the Hearing Minutes or Exhibits. The Respondent stipulates that the originals may be presented to any court to which this proceeding may come, with

the same force and effect as though made parts of a printed record.

C. The report and findings of the Subcommittee of the Committee on Grievances, and the report of the Secretary of such Committee, each dated April 25, 1951. These documents are annexed hereto, marked "Appendix C."

D. The report, dated July 31, 1951, of the Regents' Committee on Discipline. This document is annexed hereto, marked "Appendix D."

E. Resolution adopted by the Board of Regents on September 28, 1951. This document is annexed hereto, marked "Appendix E."

F. Order of the Commissioner of Education, dated October 5, 1951. This document is not physically annexed [fol. 52] hereto, because it is appended to the Petition.

Wherefore, it is hereby prayed that the Petition be dismissed or the determination confirmed.

Albany, November 1, 1951.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for the Respondent, The Capitol, Albany, N. Y.

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#### APPENDIX C TO ANSWER

#### Report of Findings, Determination and Recommendation

Department of Education, State of New York

Sub-Committee on Grievances

To the Committee on Grievances:

The undersigned, subcommittee of the Committee on Grievances duly designated to hear the charges against Dr. Edward K. Barsky, hereinafter referred to as respondent, pursuant to Section 6515 of the Education Law of the State of New York, and to report its findings, determination and recommendation in respect to the said charges, do hereby, after due deliberation, unanimously report its findings, de [fol. 53] termination and recommendation as provided by law, as follows:

### Record of Proceedings

Petition containing charges verified: April 1, 1948.

Notice of hearing upon charges returnable: April 22, 1948.

Place of hearing: Suite 12-C, Hotel Marguery, 399½ Madison Ave., N. Y. C.

Respondent served with copy of notice of hearing and charges: April 2, 1948.

Answer of respondent as amended verified February 9, 1951 and filed February 9, 1951.

Petitioner appears by Nathaniel L. Goldstein, Attorney General of the State of New York, by Sidney Tratikoff, Assistant Attorney General.

Respondent appears in person and by his attorney, Abraham Fishbein, Esq., 150 Broadway, New York, N. Y.

Hearings held on February 15, 1951, April 12, 1951.

### Findings of Sub-Committee

1. Dr. Edward K. Barsky, the respondent herein, graduated from the College of Physicians and Surgeons of Columbia University in February, 1919, and on March 14, 1919, he received license No. 14704 from the New York State Department of Education, which authorized him to practice medicine in the State of New York.

2. Respondent is currently registered to practice medicine with the New York State Department of Education, [fol. 54] from office premises at 54 East 61st Street, in the Borough of Manhattan, County, City and State of New York.

3. Respondent was charged in these proceedings with having been convicted of a crime. The undisputed evidence discloses that the respondent was indicted by the Grand Jury in the District Court of the United States for the District of Columbia, in an indictment which appears to have been filed in the aforesaid court on March 31, 1947. This indictment charged this respondent with the crime of contempt of the House of Representatives' Committee on Un-American Activities, in failing to produce books, ledgers, records and papers in response to a subpoena issued by authority of the House of Representatives of the Congress of

the United States, in a matter pertaining to an investigation then being conducted by the aforesaid Committee. Following a trial on the aforesaid indictment, the respondent was found guilty of the crime charged against him which was a violation of Section 192, Title 2 of the United States Code. On July 16, 1947, the respondent was accordingly sentenced in the aforesaid court to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment for a period of six months in a common jail, and to pay a fine of \$500. We conclude that the respondent has been convicted of a crime, in a court of competent jurisdiction, within the purview and meaning of Section 6514, subdivision 2(b) of the Education Law of the State of New York.

4. We are satisfied that the respondent was, in fact, guilty of the crime of which he was convicted. Respondent was the chairman, and one of the active participants in the [fol. 55] activities of the Joint Anti-Fascist Refugee Committee. He personally attended and voted at meetings of this organization held in the latter part of 1945 and early part of 1946, at which time the attitude and policies of the organization towards the Congressional investigation were formulated and determined.

The respondent presented testimony and numerous exhibits in support thereof, which establishes that the Joint Anti-Fascist Refugee Committee engaged in many projects which were ostensibly philanthropic in character. Substantial sums of money were collected by this Committee, which were in a great measure expended upon philanthropic projects, devoted to the relief of Anti-Franco refugees, following the Civil War in Spain. It further appears that the work of the Committee was supported by numerous reputable organizations and individuals between 1942 to at least 1946. It also appears that there were complaints lodged against the Committee by some individuals with the F. B. I. and with the Congressional Committee on Un-American Activities. These complaints suggested that the activities of the Joint Anti-Fascist Refugee Committee might be subversive in character. The Congressional Committee subpoenaed the books and records of the Joint Anti-Fascist Refugee Committee, for the purpose of investigation, and to determine whether the Joint Anti-Fascist Re-

fugee Committee was, in fact, engaged in subversive activities. The failure of the respondent, as well as the other executive members of the Joint Anti-Fascist Refugee Committee, to produce the books and records pursuant to subpoena precluded the Congressional Committee from pursuing its investigation. Because of the respondent's disobedience to the subpoena, he was convicted of contempt [fol. 56] of Congress, as is hereinabove set forth. The books and records of the Joint Anti-Fascist Refugee Committee have never been available for examination and study by the Congressional Committee. We do not feel that we are now concerned, nor would we be able to determine, whether the books and records of that Committee would disclose whether the Committee was completely philanthropic in character, or whether it was engaged in subversive activities.

Ever since 1947, the Committee has been listed as subversive by the Attorney General of the United States. The respondent suggests that his motives, and the motives of his colleagues on the Committee, in refusing to make these books available to the Congressional Committee, were predicated upon a desire to safeguard the life, liberty and welfare of the recipients of the Committee's charity. Unfortunately, the end result of the refusal to produce the books and records by the respondent and his colleagues of the Committee, was that the respondent and others were found guilty of contempt, and the Congressional Committee was frustrated in their efforts to determine the entire facts concerning the activities of the Joint Anti-Fascist Refugee Committee.

We recognize that respondent's difficulties may be partially charged to his having followed the advice of counsel. We cannot, however, completely condone the respondent's attitude at the time of the Congressional investigation. His conduct and that of his colleagues on the Committee did, in fact, thwart the efforts of the Congressional Committee in a matter which was, and is, of serious concern to the government and people of the United States.

[fol. 57] The respondent has actually served a five months period of imprisonment and has thus already sustained some suspension from the practice of medicine. We have

taken this fact into consideration in making our present recommendation. We have also taken into consideration the testimony and letters submitted in support of his character. In the light of all of the foregoing circumstances, we recommend that respondent's license to practice medicine should now be suspended for a period of three months.

### Conclusion

We find that the charges against the Respondent, as above found, have been sustained by sufficient legal evidence.

### Recommendation

For Respondent's misconduct as above found, we recommend that his license to practice medicine be suspended for three months.

### Record

We submit herewith the following:

1. Transcript of stenographic minutes of hearing.
2. Exhibits.

Dated: New York, N. Y., the 25th day of April, 1951.

(Sgd.) Leander H. Shearer, Chairman; Horace E. Ayers, C. Gorham Beckwith.

[fol. 58] Certificate of Secretary

Department of Education, State of New York

Committee on Grievances

To the Board of Regents:

I, the undersigned, Secretary of the Committee on Grievances duly appointed pursuant to the Education Law of the State of New York, do hereby certify:

1. That charges, in writing, were duly preferred and filed against Dr. Edward K. Barsky, a duly licensed physician of the State of New York, hereinafter referred to as respondent, wherein respondent was charged with having been convicted of a crime within the purview of Section 6514, subd. 2(b) of the said Education Law, and a copy of the said

charges with notice of hearing were duly served upon the respondent, and hearing duly had thereon before a subcommittee of the Committee on Grievances which found Dr. Edward K. Barsky guilty of the charges as set forth in its written report, containing its findings, determination and recommendation as presented and filed with the Committee on Grievances.

2. That the findings, determination and recommendation of the said subcommittee on the aforesaid charges against Dr. Edward K. Barsky, the respondent herein, were made the findings, determination and recommendation of the [fol. 59] Committee on Grievances on 25th day of April, 1951 except as may be hereinafter modified, if any, which unanimously determined that the respondent was guilty of the charges to the extent above found.

3. That — is recommended to the Department of Education by a majority vote of the Committee on Grievances that for respondent's misconduct as hereinbefore found, respondent's license to practice medicine be suspended for a period of six months and that the entire record of the proceedings herein be duly certified by the Secretary, and transmitted to the Board of Regents.

I further certify that the vote of the Committee on Grievances on the said report containing the findings, determination, and recommendation as to the charges against Dr. Edward K. Barsky was as follows and the vote was so recorded:

#### Record of Vote

Member	Recommendation	Vote
Dr. George C. Vogt	6 months suspension	Guilty
Dr. Horace E. Ayers	3 months suspension	"
Dr. Ralph I. Lloyd	6 months suspension	"
Dr. Leander H. Shearer	3 months suspension	"
Dr. C. Gorham Beckwith	3 months suspension	"
Dr. Edwin A. Griffin	6 months suspension	"
Dr. Frank E. Mallon	6 months suspension	"
Dr. William W. Street	6 months suspension	"
Dr. Nelson W. Strohm	6 months suspension	"
Dr. Clarence P. Thomas	3 months suspension	"

[fol. 60] I further certify that annexed hereto is a true copy of the record and proceedings taken herein, as follows:

1. Transcript of the Minutes.
2. Report, Findings and Recommendation of the Subcommittee.
3. Exhibits.

All of which is respectfully and unanimously submitted.

Dated: 25th day of April, 1951.

(Sgd.) Horace E. Ayers, Secretary

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#### APPENDIX D TO ANSWER

#### Report of the Regents' Committee on Discipline

The University of the State of New York

State Education Department

To the Board of Regents:

Your Committee on Discipline, appointed pursuant to Chapter 514 of the Laws of 1945, reports as follows in connection with the above entitled case.

On July 11, 1951, in the Regents' Room, Suite 12C, 399½ Madison Avenue, New York, New York, a hearing was ac-[fol. 61] cored Edward K. Barsky, at which he appeared in person and by counsel. Daniel M. Cohen, Assistant Attorney General, represented the State.

Copies of the charge preferred against said Edward K. Barsky and of the findings, determinations and recommendations of the Subcommittee of the Medical Committee on Grievances, and of the Medical Committee on Grievances, are submitted herewith.

Your Committee has examined the record submitted and has given careful consideration thereto and to argument of counsel.

The Medical Committee on Grievances has found that Respondent has been convicted of a crime in a court of competent jurisdiction, within the purview and meaning of subdivision 2 (b) of Section 6514 of the Education Law. The

Subcommittee of the Medical Committee on Grievances which conducted the hearing recommended that Respondent's license be suspended for three months. By majority vote the Medical Committee on Grievances has recommended that Respondent's license be suspended for a period of six months (six members so voting, and the remaining four—including the three members of the Subcommittee—voting for a three months' suspension).

The charge in this proceeding is based on Respondent's conviction in June, 1947, in a jury trial in the District Court of the United States for the District of Columbia, of a violation of Title 2, Section 192, of the United States Code.<sup>1</sup>

[fol. 62] The indictment named Respondent and sixteen others, all being members of the Executive Board of the Joint Anti-Fascist Refugee Committee (hereinafter referred to as "the Refugee Committee"), an unincorporated association having its main office in New York City. While the indictment does not so state, Respondent was Chairman of the Refugee Committee.

The introductory portion of the indictment recites that during the time in question the Committee on Un-American Activities of the House of Representatives (hereinafter, and in the indictment, referred to as "the Congressional Committee") was conducting an investigation authorized by House Resolution No. 5 of the 79th Congress into Subversive and Un-American propaganda activities in the

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<sup>1</sup> That Section reads as follows:

"§ 192 *Refusal of witness to testify*

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

United States, and that during that period the Congressional Committee was seeking to obtain access to records of the Refugee Committee upon the matter under inquiry, and issued subpoenas directed to the defendants and to the Refugee Committee requiring the production of such records.

The first count of the indictment, charging a violation of Title 18, Section 88, of the United States Code, charged the defendants with conspiracy to defraud the United States by interfering with a function of its government through preventing the Congressional Committee from obtaining [fol. 63] access to the records of the Refugee Committee and with conspiracy to make willful default of the subpoenas of the Congressional Committee in violation of Title 2, Section 192, of the United States Code. The trial court, at the conclusion of the trial, directed entry of judgment of acquittal on this conspiracy count.<sup>2</sup>

The second count of the indictment, under which Respondent and the other defendants tried with him were convicted,<sup>3</sup> reads as follows:

"Before the date of April 4, 1946, by authority of the House of Representatives the defendants and each of them were summoned to produce before the Congressional Committee on April 4, 1946, records and papers upon the matter under inquiry, that is to say,

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<sup>2</sup> Neither the full text of the first count of the indictment nor a full account of the disposition of that count by direction of judgment of acquittal appears in the record of the present proceeding. It was, however, agreed by counsel on the hearing before us that we should, in our consideration of the case and the preparation of our report and recommendations, examine, consider and take into account such matter outside of the record of the present proceeding as we should deem relevant, including specifically the record of the criminal case in the District Court of the United States for the District of Columbia (which is referred to in part, but not introduced in full, in the record of the present proceeding).

<sup>3</sup> One of the defendants named in the indictment was separately tried.

all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946.

[fol. 64] "In response to these subpoenas each and all of the defendants appeared before the Congressional Committee in the City of Washington, District of Columbia, on April 4, 1946, but failed to produce the records called for in the subpoenas, as they had power to do, and thereby wilfully made default."<sup>4</sup>

Upon conviction, Respondent was sentenced to imprisonment for six months and to pay a fine of \$500. The conviction was affirmed in March, 1948, by the United States Court of Appeals for the District of Columbia, one of the three judges dissenting (*Barsky et al. v. United States*, 167 F. 2d 241). A petition for a writ of certiorari was denied by the Supreme Court of the United States in June, 1948 (334 U. S. 843); and petitions for rehearing of this denial were denied in May, 1950, with a notation that Mr. Justice Black and Mr. Justice Douglas were of the opinion the petitions should be granted (339 U. S. 971). Thereupon

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<sup>4</sup> The subpoena served on Respondent was served on January 28, 1946, and differed in several respects from the subpoenas served on the other defendants, referred to in the indictment. For example, it called for the production of records for the calendar years 1944 and 1945 (instead of for the period from January 1, 1945, to March 29, 1946), and called explicitly for the names and addresses of contributors to the Refugee Committee and of recipients of its funds. The subpoena served on Respondent was returnable on January 30, 1946. Respondent appeared pursuant thereto not on April 4, 1946, as did the other defendants, but on February 13, 1946. At the criminal trial, the court instructed the jury that these variances from the facts stated in the indictment were as a matter of law immaterial.

Respondent served his prison sentence, being confined for five months (on the six months' sentence).

Respondent challenges the legal basis of the charge of [fol. 65] which he has been found guilty in this proceeding. We turn first to a consideration of questions raised in this regard.

#### *Challenge to Legal Basis of Charge*

Subdivision 2 of Section 6514 of the Education Law authorizes discipline of a physician "upon decision after due hearing . . .

(b) That a physician has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Respondent's position is that the Federal offense of which he was convicted is not "a crime" within the meaning of this provision.<sup>5</sup>

We may dispose at the outset of a subsidiary point made by Respondent's counsel, that violation of Section 192 of Title 2 of the United States Code is not "a crime" under the laws of the United States. Counsel's argument based on the omission of this offense from Section 402 of Title 18 of the United States Code, entitled "Contempts constituting crimes," seems to us wholly unpersuasive. Another argument, that Federal crimes must be defined by acts of Congress, and that Section 192 of Title 2 was adopted by joint resolution and not by bill, is in our view without

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<sup>5</sup> Respondent does not challenge his conviction in the United States District Court by seeking to reopen the question of his guilt of the Federal offense of which he was there convicted; nor would there be any basis for such a challenge, since the question under the disciplinary statute is simply whether he was "convicted" not whether he was "guilty" (*cf. Matter of Donegan*, 282 N. Y. 285, 293; compare also other disciplinary provisions of the Education Law, *e.g.*, subdivision 1-a of Section 6911, relating to nursing, where the question is whether "such licensee is guilty of a crime").

[fol. 66] merit.<sup>6</sup> In any event, the question for decision in this proceeding is a question of the correct interpretation of Section 6514 of the Education Law, and we cannot attribute to the New York Legislature an intention to draw any such distinctions as those which these arguments of Respondent's counsel suggest.

There remains, however, the major argument advanced by Respondent's counsel, which does raise a substantial question as to the proper interpretation of the words "a crime" in subdivision 2 (b) of Section 6514 of the Education Law. That argument is (1) that the statute applies to a conviction "without this state" only if the offense is a crime under the New York law, and (2) that contempt of Congress is not such an offense.

The first branch of this argument finds support by analogy in decisions of the New York courts. We know of no decision, however, which is precisely in point; and, since the question is one of statutory interpretation, a decision interpreting a different statute or instrument in different circumstances cannot finally determine the question.

In *Matter of Donegan, supra*, 282 N. Y. 285, an attorney had been convicted in the United States District Court for the Southern District of New York of the crime of conspiracy to use the mails to defraud, a felony under the Federal law; and the Appellate Division had held that disbarment followed automatically under the provisions of the then Sections 88 (subdivision 3) and 477 of the Judiciary Law, providing for automatic disbarment of an attorney "convicted of a felony". The Court of Appeals held that [fol. 67] these statutory provisions were to be construed as applying to conviction of a felony in a Federal court as well as in a court of the State of New York,<sup>7</sup> but limited their

<sup>6</sup> Legislation adopted by joint resolution, approved by the President, goes through the same legislative process, and has the same force of law, as legislation adopted by bill (IV Hinds' Precedents of the House of Representatives of the United States, Sections 3370-3375).

<sup>7</sup> This construction was reached on the basis of a reference in subdivision 4 of Section 88 to "pardon by the President of the United States . . .".

application to cases where the offense is a felony under the New York law. Stating that the offense of conspiracy to commit a crime is only a misdemeanor under the New York law (282 N. Y. at 287), the Court of Appeals reversed the Appellate Division's order of automatic disbarment.<sup>8</sup> It may be noted, as weakening somewhat the force of this decision as a precedent on the question before us, that the Court of Appeals applied here the doctrine that penal statutes must be strictly construed, whereas the general rule, applicable to the present proceeding, is that a disciplinary statute is not penal (*e.g.*, *Matter of Rouss*, 221 N. Y. 81).<sup>9</sup>

In *People ex rel. Marks v. Brophy*, 293 N. Y. 469, a prisoner serving a ten-year term was released on parole at the expiration of five years on condition that if he should, while on parole, commit and be convicted of "a felony either in New York State or any other state," he would forfeit the time served on parole and be compelled to serve the full five-year balance of his original ten-year sentence. After more than three years on parole the prisoner was [fol. 68] convicted, on a plea of guilty in a United States District Court in Tennessee, of the Federal crimes of using the mails to defraud and conspiring to do so, both crimes being felonies under the Federal law; and, after serving his Federal sentence, he was returned to a New York State prison to serve the five-year balance of his New York sentence. In this proceeding on a writ of habeas corpus, the Court of Appeals held that the prisoner had not violated the condition of his parole, and that he had thus not forfeited the time he had spent on parole before his Federal convic-

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<sup>8</sup> The Court of Appeals remitted the case to the Appellate Division for further proceedings under subdivision 2 of Section 88, authorizing discipline of attorneys "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor" (282 N. Y. at 293).

<sup>9</sup> The Court's application of the doctrine of strict construction in *Matter of Donegan* was based on the conclusion "that the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment" (282 N. Y. at 292).

tion. Stating the question to be the meaning and application of the words "a felony, either in New York State or any other state", the Court held that the Federal felonies of which the prisoner had been convicted were not within that meaning. Referring to other cases and statutory provisions bearing out "the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction" (293 N. Y. at 474), the Court said (293 N. Y. at 475):

" . . . We think consistency requires that the parole agreement signed by this relator in 1935 should be construed so as to require a forfeiture only in the event of relator's conviction of a crime known to our laws as a felony. The crimes adjudged by the Federal courts against this relator (using the mails to defraud and conspiring so to do) are crimes unknown to our State Penal Law and not cognizable at all in our State courts . . . "

It may be noted, again, that since this decision involved a criminal penalty it is not determinative on the question before us.

[fol. 69] But these decisions, even though not determinative, do in our view throw light on the question involved here.<sup>10</sup> In that light we believe that, to come within the

<sup>10</sup> We do not consider relevant another decision cited by Respondent's counsel, *Matter of Tonis v. Board of Regents*, 295 N. Y. 286, dealing with the automatic revocation of a physician's license upon his conviction of a felony, pursuant to subdivision 1 of Section 1264 (now subdivision 1 of Section 6514) of the Education Law. It was there held that automatic revocation of the respondent's license was unauthorized, the felony offense of which he had been convicted in the United States District Court for the Southern District of New York being only a misdemeanor under the New York law; but the decision followed as a matter of course because of the definition of "conviction of felony" in Section 1251 (now Section 6502), referred to in subdivision 1 of Section 1264, as "the conviction of any offense which if committed within the state of New York would constitute a felony under the laws thereof."

meaning of subdivision 2(b) of Section 6514, "a crime" of which a physician is convicted in a court outside this State must bear some relation to "crime" as recognized by the laws of New York.<sup>11</sup> New York, for example, permits marriage between first cousins (see Domestic Relations Law, Section 5). If a physician were convicted of crime in Arkansas because of his marriage there to his first cousin,<sup>12</sup> we would not read Section 6514 as subjecting him to discipline. Recognizing, then, that there must be some relation to the laws of New York, we proceed to inquire into the nature of that relation.

The *Donegan* and *Marks* cases, discussed above, appear to leave this question undecided. In the *Marks* case the Court of Appeals, in the context of the problem then before it, noted that the Federal crimes of using the mails to defraud and conspiring so to do "are crimes unknown to [fol. 70] our State Penal Law." In the *Donegan* case, a disciplinary proceeding against an attorney, also involving conspiracy to use the mails to defraud, the Court noted that the offense of conspiracy to commit a crime is a misdemeanor under the New York law.<sup>13</sup> Thus the *Donegan* decision might appear to take *conspiracy* as a type of crime cognizable by the New York law (without regard to the question whether the object to which the conspiracy is directed would itself be criminal under the New York law) and to conclude that guilt of "conspiracy" as such was

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<sup>11</sup> It is to be noted that subdivision 2(b) of Section 6514 apparently covers conviction not only in Federal courts and in courts of other states but in courts of foreign countries as well.

<sup>12</sup> See Arkansas Statutes, 1947, Sections 55-103, 41-811; *Nations v. State*, 64 Ark. 467, 43 S. W. 396.

<sup>13</sup> In view of the broad language of subdivision 2 of the then Section 88 of the Judiciary Law, quoted in footnote 8, it is possible to read the *Donegan* decision as not limiting the Appellate Division to the question of "crime or misdemeanor"; but the language of the Court of Appeals (282 N. Y. at 293): "The judgment of conviction will constitute at least *prima facie* evidence of guilt of the crime charged", makes such a reading difficult.

sufficient; or it may be that (though there is no explicit statement in the opinion to that effect) the result was reached because the particular conspiracy charged involved obtaining money by fraud, though the particular kind of fraud was not cognizable under the New York criminal law.

We turn now to a consideration of the second branch of the argument advanced by Respondent's counsel, that the Federal crime of which Respondent has been convicted is not "a crime" under the New York law. In the light of the earlier discussion, this may be restated as a question whether the Federal crime of which Respondent has been convicted bears a sufficient relation to the criminal law of New York to bring it within the meaning of subdivision 2(b) of Section 6514. Stated either way, the question is apparently to be determined by the provisions of the applicable criminal statutes, Federal and New York (see *People v. Olah*, 300 N. Y. 96).

[fol. 71] Obviously, default in the production of subpoenaed documents before the Congress or a Congressional committee is not a violation of any provision of the New York law. There is, however, a provision of the New York Penal Law making default in the production of documents before the Legislature or any committee thereof a misdemeanor.<sup>14</sup> Assuming for the moment that the two statutes are substantially similar in terms, the question is whether this is sufficient to bring the Federal offense within the meaning of subdivision 2(b) of Section 6514 of the Education Law.

If the interpretation of the *Donegan* case first suggested above is correct (namely, that guilt of conspiracy was suf-

<sup>14</sup> This provision of the Penal Law reads as follows:

"§ 1330. REFUSING TO TESTIFY

A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor."

ficient there, without regard to the object of the conspiracy), then it is strongly arguable here that the fundamental type of crime in both jurisdictions is default in the production of documents before a legislature or legislative committee, and that conviction of the Federal offense of this type is sufficient here. On this analysis there would appear to be a strong likeness to a case of conviction in a Federal court of the crime of evasion of the Federal income tax law; and we have little doubt that such a conviction would be ground for discipline under the New York disciplinary statute.

There is, it should be added, an argument tending against the application of the *Donegan* doctrine in the present proceeding. Clearly, the object of the *Donegan* conspiracy was morally wrong. On the other hand, the Supreme Court of the United States has said that "no moral turpitude is involved" in violation of the Federal statute under which Respondent has been convicted.<sup>15</sup>

(Section 102 of the Revised Statutes, here referred to, was the predecessor of Section 192 of Title 2 of the United States Code.)

It is arguable from *United States v. Murdock*, 290 U. S. 389 at 396-7, discussing the *Sinclair* case, that the language quoted in the text applies only to refusing to answer questions and not to "willfully making default" in appearing or (as here) in producing documents; but we believe that it applies here also (see page 16, *infra*, and *Fields v. United*

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<sup>15</sup> *Sinclair v. United States*, 279 U. S. 263 at 299:

"There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. . . ."

*States*, 164 F. 2d 97, cited in *Barsky et al. v. United States*, 167 F. 2d 241 at 251).

We have assumed above that Section 192 of Title 2 of the United States Code and Section 1330 of the New York Penal Law are substantially similar in terms. Respondent's counsel argues, against this assumption, that the Penal Law provision requires explicitly that a defendant have the documents "in his possession or under his control"; that the Federal statute was, in the criminal case here, held to be applicable though none of the defendants individually had custody or control of the subpoenaed documents;<sup>16</sup> that [fol. 73] the Federal statute has thus been given a judicial construction which would not be given to the New York statute; and that the crimes are thus different. We note only that there is no way for us to forecast whether the New York courts would hold in a case like the present one that defendants had "control" within the meaning of the New York statute, since so far as we know the question has never been judicially determined.

In any event, the various questions discussed above cannot be authoritatively answered until the courts have spoken; and they are at least close enough to require, in our view, that the Board of Regents assert its jurisdiction under the disciplinary statute. A decision by the Board of Regents against its own jurisdiction would remove the questions from consideration by the courts; and we do not believe that they should be so removed.<sup>17</sup>

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<sup>16</sup> This point, which was one of those on which Respondent and the other defendants relied before the Congressional Committee as well as in the criminal court, was authoritatively decided against their contention by the Supreme Court of the United States (Justices Black and Frankfurter dissenting) in a companion criminal case involving the one member of the Executive Board of the Refugee Committee, named in the indictment, who was not tried with the other defendants but separately tried (*United States v. Fleischman*, 339 U. S. 349).

<sup>17</sup> See Benjamin, *Judicial Review of Administrative Adjudication*, 48 Columbia Law Review 1, 16.

We therefore recommend that the finding of the Medical Committee on Grievances that Respondent has been convicted of a crime in a court of competent jurisdiction, within the purview and meaning of subdivision 2(b) of Section 6514 of the Education Law, be approved; and we turn now to a consideration of the measure of discipline.

#### *The Measure of Discipline*

While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline beyond the statutory minimum of censure and reprimand must, we believe, be based either on [fol. 74] the inherent nature of the respondent's violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline.

We have noted above (page 13) that violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude. We find on examination of the record and of the other material that we have examined no legal evidence to support any finding of conduct on Respondent's part (apart from the inherent nature of the crime of which he has been convicted) that would justify discipline beyond the minimum. We therefore conclude that he should be censured and reprimanded, and no more. We proceed to discuss the grounds of this conclusion.

Before discussing the conduct of Respondent and the other members of the Executive Board of the Refugee Committee that led to their indictment, trial and conviction, it will be useful to consider what was litigated and adjudicated at the criminal trial and what was excluded from the issues there litigated.

The issues litigated at the criminal trial were primarily issues of law. The only substantially disputable issues of fact, namely, whether the Congressional Committee had before it sufficient information to justify its issuance of the subpoenas, and whether the documents subpoenaed were pertinent to its inquiry, were heard by the trial judge outside the presence of the jury; and, under his ruling as to the nature of the issues, the evidence was limited to such informa-

ol. 75] tion as the Congressional Committee actually had before it.<sup>18</sup> Deciding that the subpoenas were validly sued, the trial judge also decided adversely to the defendants constitutional issues raised by them as to the authority and operation of the Congressional Committee, and a legal issue raised by them as to their not individually having had custody or control of the records of the Refugee Committee.<sup>19</sup> The trial judge decided also, in accordance with the doctrine of *Sinclair v. United States, supra*,<sup>20</sup> that the word "willfully", as used in the statute, means deliberately and intentionally, *i. e.*, not inadvertently or accidentally; he instructed the jury:

" . . . Thus, the motive of the defendant in failing to comply with the subpoena and his reason for such failure are not material, so long as you find that he did so intentionally and deliberately."

On the record before the jury there was no doubt that the failure of the defendants to produce the documents before the Congressional Committee was "willful" within this instruction. The trial judge also instructed the jury:

"The nature of the activities of the defendants, or of the organization with which they were connected, is not an issue in this case, and it is your duty entirely to disregard any speculation on that subject. . . ."

been decided as a matter of law against the defendants, and fol. 76] It is clear on the record of the criminal trial as a whole that, the constitutional and legal defenses having

<sup>18</sup> Thus the defendants were not permitted to produce evidence to dispute or explain the information which the Congressional Committee had received or to attempt to establish what the defendants contended were the true facts with respect to the Refugee Committee's operations; and only one of the witnesses who had testified before the Congressional Committee was produced for cross-examination by the defendants.

<sup>19</sup> See footnote 16.

<sup>20</sup> See footnote 15.

the issues for the jury's consideration being limited as a matter of law as we have noted above, there was no ground on which the jury could properly have acquitted the defendants (except perhaps under the instruction that evidence of good character might be sufficient to create a reasonable doubt).

For our present purposes, this account of the issues litigated and not litigated at the criminal trial comes down to the following essentials: There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient. There was thus adjudication that, without legally sufficient justification, the defendants had intentionally and deliberately failed to produce the subpoenaed records. There was, at the same time, a directed judgment of acquittal on the first (conspiracy) count of the indictment,<sup>21</sup> on the ground that sufficient evidence had not been introduced to permit the case to go to the jury on that count.

It thus appears that (apart from the inherent nature of the crime of which Respondent was convicted, which we have seen to be negative in so far as the imposition of more than minimum discipline is concerned) nothing was adjudicated in the criminal trial which would in itself justify imposition of more than the minimum discipline. We turn, therefore, to a consideration of the other evidence, including evidence (not material in the criminal trial) offered by Respondent here in explanation of the conduct that led to his conviction.

The Refugee Committee was organized in 1942 as the result of a "merger in part" of three earlier organizations with some or all of which members of its Executive Board, including Respondent, had been actively associated. The announced purpose of the Refugee Committee was the furnishing of relief to Spanish Republican refugees from the Franco regime in Spain and members of the International

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<sup>21</sup> Summarized at pages 3 and 4, *supra*.

Brigade which had fought in Spain on the anti-Franco side. As a relief organization it was licensed by the President's War Relief Control Board, and as a charitable organization it was accorded tax-exempt status by the Treasury Department. It raised large sums of money in the United States through various means including meetings and street-corner solicitation. It expended large sums abroad, principally in France, Mexico, North Africa and Portugal, and much smaller sums in the United States for "legal aid, visas, transportation and rehabilitation". The relief furnished included cash relief, relief in kind, shelter, and in some instances the organization of hospitals, rest homes and schools; and transportation was furnished to countries, principally Mexico, where the refugees would be permitted to settle.

Apparently the first approach by the Congressional Committee to the Refugee Committee was in November, 1945. On November 12 a representative of the Congressional Committee called at the Refugee Committee's office [fol. 78] and asked for a list of the names of contributors with the amount of each contribution and a list of the Refugee Committee's expenditures by name and amount, for the preceding twelve months. On November 20 this call was followed up by a letter from the Chief Counsel of the Congressional Committee to Respondent as Chairman of the Refugee Committee. On November 27 Respondent replied that the Refugee Committee, under its license issued by the President's War Relief Control Board, made periodic reports to the Board, and suggested that the Board would make these available to the Congressional Committee. On December 8 or 11<sup>22</sup> the Chief Counsel of the Congressional Committee wrote again, stating that the Congressional Committee desired to make a preliminary investigation of the Refugee Committee "to determine whether or not this Committee is interested in your activities."

On December 14, 1945, a Congressional Committee subpoena dated December 4, addressed to "Helen R. Bryan,

<sup>22</sup> The record is not clear as to the date of this letter; conceivably there were two similar letters on December 8 and December 11.

Executive Secretary or Doctor Edward Barsky, Chairman" of the Refugee Committee, was served on Helen R. Bryan. It called for production before the Congressional Committee on December 19 of "all books, records, papers and documents showing all receipts and disbursements of money by the said Committee, or on its behalf, and all letters, memoranda or communications from, or with, any person or persons outside of the United States." On the same day, December 14, 1945, the Executive Board of the Refugee Committee held a meeting, the minutes of which recite that the Executive Board considered that the Refugee Committee's operations were not within the Congressional Committee's field of investigation and that the Congressional Committee's demands were unwarranted, and thereupon adopted a resolution instructing its Chairman and Executive Secretary to advise with competent lawyers and to take any additional steps necessary to protect the rights of the Refugee Committee. On December 15 the Refugee Committee wrote to Chief Counsel of the Congressional Committee reporting, with a statement of reasons substantially as recited in these minutes, that the Executive Board, "after considering the request to investigate the records of this organization, finds that it is not possible to accede to this request." Thereafter, on January 24, 1946, Helen R. Bryan, the Executive Secretary, appeared before the Congressional Committee in response to the subpoena (her appearance having been adjourned to that date), but failed to produce the subpoenaed records.<sup>23</sup>

On January 28, 1946, Respondent as Chairman of the Refugee Committee was served with another and broader subpoena, dated January 25 and returnable January 30, for the production of Refugee Committee records. It was for his failure to produce the records in response to this subpoena on the adjourned return date of February 13, 1946, that Respondent was convicted (see footnote 4). Meanwhile, Respondent and other officers of the Refugee

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<sup>23</sup> It appears that Helen R. Bryan was not prosecuted for this default; but she was prosecuted for default on April 4, 1946, of another subpoena later served on her, and was convicted (see *United States v. Bryan*, 339 U. S. 323).

Committee had, on February 7, written to the Chairman of the Congressional Committee a long letter explaining the [fol. 80] Refugee Committee's position (Respondent's Exhibit CC in this proceeding); and on February 11 the Executive Board of the Refugee Committee had held a further meeting at which it had instructed Respondent as Chairman not to produce the subpoenaed records. On his appearance before the Congressional Committee on February 13, Respondent submitted a written statement of reasons for not producing the subpoenaed records, which is Respondent's Exhibit GG in this proceeding.

We have noted above that Respondent's motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here. In considering those motives and reasons, as stated in Respondent's Exhibits CC and GG and in Respondent's testimony, we must do so in the light of certain concessions which the Attorney General has made on the present record.

There were, first, concessions with regard to the reasonableness of the legal advice, which Respondent received from his counsel, that there were valid constitutional and other legal objections to the subpoenas. The Attorney General formally conceded that Respondent "was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them"; that the opinion on the constitutional question held by Respondent's counsel "was held by many lawyers and some jurists"; that there were "expressions in some legal journals" that the subpoenas were illegal; and that such an opinion was held by one of the judges of the Court of Appeals before which the case came up on appeal. Later the Attorney General stated:

[fol. 81] "I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part";

and again:

"I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable."

Second, as bearing on the motives of Respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney General made the following concession:

" . . . I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the conduct of the House Committee on Un-American Activities at the time." <sup>24</sup>

The principal reasons given by Respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel [fol. 82] that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) <sup>25</sup> the Congressional Committee was au-

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<sup>24</sup> The Attorney General conceded further that Congressmen were included among the "people of prominence" who held such views, and that there were Congressmen who at that time made speeches "against the activities of [the Congressional Committee], against its procedure and otherwise."

<sup>25</sup> House Resolution No. 5 of the 79th Congress, 1st Session, provided:

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in

thorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its "regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad", and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their record, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement [fol. 83] emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945, asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined by the courts.

If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which

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the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

such legal questions are raised (*Sinclair v. United States, supra*). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis.

A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But [fol. 84] there is no such evidentiary showing. It may be that some of those connected with the Refugee Committee, perhaps Respondent among them, had Communist affiliations, and it may be that through them the Refugee Committee was led into some unspecified subversive activity; but there is no legal evidence to support these hypotheses, and conjecture cannot take the place of evidence.

There is, it should be noted, evidence in the record, and reliance on that evidence in the findings of the Medical Committee on Grievances, that the Refugee Committee had been listed as Communist in the list furnished by the Attorney General of the United States to the Loyalty Review Board of the United States Civil Service Commission under the provisions of Part III, Section 3, of Executive Order No. 9835. After the hearing below and the determination of the Medical Committee on Grievances, the Supreme Court of the United States reversed an order of the District Court dismissing a complaint by the Refugee Committee in an action by it for declaratory and injunctive relief (*Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 341 U. S. 123), some of the majority justices going on the ground that a determination of this kind could not constitutionally be made without a hearing and opportunity to offer proof and disproof. In view of this de-

cision, no evidentiary weight can be given in the present proceeding to the listing by the Attorney General.<sup>26</sup>

Having mentioned grounds of conjecture to the disadvantage of Respondent's position, a proper balance requires [fol. 85] that we mention briefly also, by way of example, some of the evidence that tends to support his position. There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. Dr. Joy testified also that, of the Spanish Republican refugees concerned, only a small proportion were Communists. There is evidence also in Respondent's Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board did in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.<sup>27</sup>

There is ground also for conjecture, favorable to Respondent's position, as to how the situation eventuating in

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<sup>26</sup> Indeed it would appear that even the dissenting justices would deny the right to use the listing in a proceeding such as this, since their dissent was based in part on the ground that the listing in itself had no legal effect (341 U. S. at 202 *et seq.*).

<sup>27</sup> This appears from an examination of House Report No. 2233, 79th Congress, 2nd Session, a report of the Congressional Committee, dated June 7, 1946, which was introduced in evidence before the judge in the criminal case. The material furnished to the President's War Relief Control Board did not include the names of contributors or the recipients of relief.

the criminal trial may have arisen. It appears from testimony in the criminal trial by Congressman Wood, Chair [fol. 86] man of the Congressional Committee, that the Congressional Committee had received complaints about the Refugee Committee, most of which "simply complained that they engaged in political propaganda." Since the Refugee Committee was engaged in raising money for the relief of Spanish Republicans, it is natural that some of its literature, and some of the speeches at meetings and on street corners, should have been anti-Franco and pro-Spanish Republican; and indeed some of the literature submitted by Respondent in this proceeding (including Respondent's Exhibit D, referred to above) is clearly of that character. It may well be that this might have been thought to be a violation of the condition of the Refugee Committee's license from the President's War Relief Control Board that it should engage solely in relief and not in political action or propaganda; and there is some indication that the President's War Relief Control Board concerned itself with this question, though the Refugee Committee's license was not revoked. But assuming that such literature and statements are to be considered propaganda (rather than an incident of fund-raising), there is no showing that it was un-American or subversive propaganda, since the official position of the United States was then anti-Franco.

In summation before the Subcommittee of the Medical Committee on Grievances, the Attorney General said:

"I would be remiss if I would by silence indicate my acquiescence in the suggestion that because now you are given some evidence of good work, that you must necessarily conclude that all that this committee did was good. It would be just as unfair and improper for [fol. 87] you to arrive at that conclusion as it would be to arrive at a conclusion that what they did was bad or subversive or un-American or Communistic or anything you please. I tell you candidly and honestly, I have no real evidence of the actual workings of this organization and whether they were or were not Communistic in their activities in part—obviously they were not in whole. But the fault of being unable to make a fair and adequate determination of the true

character of this organization does not lie at the doorstep of anyone, more than it lies on the doorstep of Dr. Barsky and his colleagues."

We agree that it is impossible to reach a conclusion from the record as to what all of the Refugee Committee's activities were. We disagree with the Attorney General's position, stated here and elsewhere and reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced.

Since violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand: [fols. 88-91] and we therefore recommend that Respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded.

Respectfully submitted, Robert M. Benjamin, John L. Bauer, M. D., Susan Brandeis, Regents' Committee on Discipline.

July 31, 1951.

**APPENDIX E TO ANSWER**

**Resolution of the Board of Regents**

**ADOPTED—September 28, 1951**

Upon consideration of the report of the Regents Committee on Discipline, made in accordance with the provisions of chapter 514 of the Laws of 1945, it was

*Voted*, That the determination of the Medical Committee

on Grievances in the matter of the application for the revocation of the medical license heretofore granted to Edward Barsky, New York City, be accepted and sustained; that, in compliance with the recommendation of said Committee, medical license No. 14704, issued under date of March 14, 1919, to said Edward Barsky, permitting him to practice medicine in the State of New York, and his registration or registrations as a physician, wherever they may appear, be suspended for a period of six months from the date of service of the order effecting such suspension; and that the Commissioner of Education be empowered and directed to execute, for and on behalf of the Board of Regents, all orders necessary to accept the determination of said Committee on Grievances and to carry out the terms of this vote.

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[fol. 92] IN NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—May 27, 1952

SIRS:

Please take notice that pursuant to leave to appeal to the Court of Appeals granted by an order of the Appellate Division of the Supreme Court, Third Judicial Department entered in the office of the Clerk of said Court on May 22, 1952, the above named petitioner hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on May 16, 1952 and filed and entered in the office of the Clerk of Albany County [fol. 93] on May 19, 1952, which order confirms the determination of the respondent, the Board of Regents of the State of New York, dated on or about September 28, 1951, suspending petitioner's medical license and permission to practice medicine in the State of New York for six months, and

this appeal is taken from the whole of said order and from each and every part thereof.

Dated: New York, May 27, 1952.

Yours, etc., Abraham Fishbein, Attorney for Petitioner, 150 Broadway, New York City.

To: Clerk of Albany County, Albany, New York. Honorable Nathaniel L. Goldstein, Attorney General of the State of New York, Department of Law, Albany, New York. (Henry S. Manley, Esq., Assistant Attorney General.)

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[fol. 94] IN NEW YORK SUPREME COURT, APPELLATE DIVISION,  
THIRD DEPARTMENT

Present: Honorable Sydney F. Foster, Presiding Justice; Honorable Christopher J. Heffernan, Honorable O. Byron Brewster, Honorable Francis Bergan, Honorable William H. Coon, Associate Justices.

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL—May 22, 1952

Petitioner having moved for leave to appeal to the Court of Appeals from the decision of this Court dated May 7, 1952, and from the final order entered thereon in the office of the Clerk of this Court on May 19, 1952, and for a stay, [fol. 95] and respondent having waived service and not having opposed the motion, now

Upon reading and filing the notice of motion dated May 9, 1952, the affidavit of Abraham Fishbein, sworn to May 9, 1952, the record, briefs, and said decision and order, and due deliberation having been had, and upon the written decision of this Court dated May 14, 1952, and it appearing to the Court that a question of law is involved which ought to be reviewed by the Court of Appeals, it is hereby

Ordered that petitioner's motion for leave to appeal to the Court of Appeals and for a stay, is hereby granted without costs, and petitioner is hereby granted leave to appeal to the Court of Appeals from the decision of this Court

dated May 7, 1952 and from the final order entered thereon in the office of the Clerk of this Court on May 19, 1952, and this Court certifies that a question of law is involved which ought to be reviewed by the Court of Appeals, and it is further

Ordered that the stay of petitioner's suspension herein is hereby continued until the commencement of the next term of the Court of Appeals.

John S. Herrick, Clerk.

Entered May 22, 1952.

[fol. 96] IN NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

[Title omitted]

ORDER CONFIRMING DETERMINATION OF BOARD OF REGENTS—  
May 16, 1952

The above entitled proceeding having duly come on before this Court at its term in March, 1952, and having been argued, and due deliberation having been had, and this Court having rendered decision at its present term, it is hereby

[fol. 97] Ordered, on the authority of Matter of Miller and Auslander v. Regents, 279 App. Div. 447, the determination of the Board of Regents is unanimously confirmed, without costs.

(S.) John S. Herrick, Clerk.

Entered 5/16/52.

IN NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

DECISION BY APPELLATE DIVISION—May 7, 1952

This is a review pursuant to Article 78 of the Civil Practice Act suspending petitioner's license for a period of six months.

Petitioner is a duly licensed physician. He was charged by the Committee on Grievances of the Department of Edu-

tion of the State of New York with having been convicted a crime in a court of competent jurisdiction within the meaning and purview of subdivision 2(b), of Section 6514, [ols. 98-99] of the Education Law, in that petitioner had been convicted in the United States District Court for the District of Columbia of a violation of Title 2, Section 192 of the United States Code, commonly known as contempt of Congress.

The questions presented on this review are the identical questions passed upon by this Court in the Matter of the Application of Jacob Auslander and Louis Miller, — App. Div. —.

On the authority of the former case, determination of the Board of Regents unanimously confirmed, without costs.

Present—Foster, P. J.; Heffernan, Brewster, Bergan and Coon, JJ.

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#### AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,

County of New York, ss:

Abraham Fishbein, being duly sworn, deposes and says that he is the attorney for the petitioner-appellant herein.

No opinion in writing was handed down by the Court below.

Abraham Fishbein.

Sworn to before me this 12th day of June, 1952.  
Joseph Goldberg, Notary Public, State of New York, Qualified in New York County, Commission expires March 30, 1954. (Seal.)

[fol. 100]

## IN COURT OF APPEALS

In the Matter of the Application of DR. EDWARD K. BARSKY, Petitioner-Appellant, for a Review under Article 78 of the Civil Practice Act, of the Determination of THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Suspending Petitioner's Medical License and Permission to Practice Medicine in the State of New York for Six Months, Respondent-Appellee

In the Matter of the Application of JACOB AUSLANDER, Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondent; Reviewing and Annulling the Determination of Respondent in Suspending the Petitioner's License to Practice Medicine in This State, as a Physician for Three Months. (Also, Matter of Louis Miller v. Same)

OPINION, DESMOND, J.:

These are proceedings, brought, under Article 78, C. P. A., to review determinations of respondent Board of Regents, suspending for certain periods the medical licenses of petitioners Barsky and Auslander, and censuring and reprimanding petitioner Miller. In each instance the Board found authority for its action in Section 6514, subd. 2(b) of the Education Law, which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime". The question on this appeal is as to the mean-  
[fol. 101] ing and application of that statute.

Each of the petitioners-appellants is a physician licensed to practice in this state. All three were members of the executive board of The Joint Anti-Fascist Refugee Committee, a voluntary association which functioned during the Second World War and immediately thereafter (see the brief statement of its history and aims, in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, at pp. 130, 131). All three were indicted in the United States District Court for the District of Columbia for, and all were, after a jury trial

in that court, convicted of, the misdemeanor of contempt of Congress, under Title 2, Section 192, of the United States Code, in that each of them failed to obey a subpoena requiring him to produce before a Congressional Committee, the financial books and records of The Joint Anti-Fascist Refugee Committee. Each was sentenced to a fine and to imprisonment. The judgments of conviction were affirmed on appeal (*Barsky et al. v. United States*, 167 Fed. 2d 241), certiorari was twice denied by the Supreme Court (334 U. S. 843; 339 U. S. 971), and each petitioner paid his fine and was imprisoned. Then followed the charges with which we deal here.

We consider that, in these records on appeal, there are no controlling facts other than those above summarized, since the voluminous testimony before the Regents as to the character and purposes of the Joint Anti-Fascist Refugee Committee, and as to the motives of these appellants, could not change the admitted fact of their conviction. From the record it is clear that each petitioner has, in fact, "been convicted in a court of competent jurisdiction \* \* \* without this state, of a crime" (Education Law, Sec. 6514, [fol. 102] subd. 2b). Petitioners, however, make these arguments: first, that the statutory language applied only to such offenses as are crimes under New York law, and that contempt of Congress (Section 192, Title 2, U. S. C.) is not a crime under any statute of this state; second, that the legislative intent of Section 6514, subd. 2(b), is to authorize disciplinary action for such offenses only as involve moral turpitude, or are related to professional ability or conduct, and, third, that the Regents imposed unwarranted punishment, and took into account prejudicial matter in fixing the penalties.

There is nothing in Section 6514, subd. 2b, which says that, in order to serve as a predicate for action thereunder, the "crime" must be one specifically forbidden as such by a New York penal statute. Indeed, a directly opposite idea is expressed in the language: "convicted in a court of competent jurisdiction, either within or without this state, \* \* \*". Such language is too plain to permit construction by addition of unexpressed qualifications or exceptions (*Matter of Rathscheck*, 300 N. Y. 346, 350). Petitioners,

however, argue that such decisions as *Matter of Donegan*, 282 N. Y. 285; *People ex rel. Marks v. Brophy*, 293 N. Y. 469; *Matter of Tonis v. Board of Regents*, 295 N. Y. 286, and *Matter of Garson v. Wallin*, 304 N. Y. 702, mean that the New York courts construe such statutes as Section 6514, subd. 2b, as authorizing penalties for such offenses only as are made criminal, if committed in this state, by our own laws. As to the Donegan, Marks, Tonis and Garson cases, each had to do with the imposition of stringent additional penalties, on, and solely because of, conviction of a "felony". Donegan, Marks, Tonis and Garson had each fallen afoul of a foreign statute which made certain conduct a [fol. 103] felony which was either a misdemeanor in New York, or not cognizable at all under our domestic statutory definitions and classifications of crimes. Indeed, this court, as to Donegan (see p. 293 of 282 N. Y.) made it clear that it was not denying the Appellate Division's *discretionary* power to deal with him as one guilty of a "crime" (former Section 88, subd. 2, now Section 90, subd. 2, Judiciary Law). In the statute now before us (Education Law, Sec. 6514, subd. 2b) the Legislature has authorized disciplinary action against one convicted, not of a "felony", but of a "crime". Traditionally as well as by express statute (Penal Law, Sec. 2), the word "crime" in New York Law includes misdemeanors as well as felonies, and so it is patent that these petitioners have "been convicted, in a court of competent jurisdiction, \* \* \* without this state, of a crime". As we remarked in *People ex rel. Marks v. Brophy*, supra, 293 N. Y. at pp. 474-5, it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction. But public policy is made by the Legislature (see *Matter of Rhinelander*, 290 N. Y. 31, 36) and the policy of this section of the Education Law cannot be misunderstood. It does not require the imposition of any particular penalties, but leaves it to the Regents to decide on the measure of discipline, up to the extreme limit of license revocation.

We do not find it necessary to rely on an additional ground, put forward in the report of the Regents' Committee on Discipline in these proceedings for holding that petitioner's conviction in the District of Columbia was for

a "crime", as that word is used in the Education Law section. The Committee on Discipline noted that New York does have, in Section 1330, Penal Law, a provision making it a misdemeanor, wilfully to refuse to produce material [fol. 104] and proper documents before a committee of our *State Legislature*. That enactment, the Regents' Committee thought, is so similar in meaning to Section 192, Title 2, United States Code, that one violating the latter is really committing about the same offense as is made criminal by our Section 1330. Be that as it may, we construe Section 6514, subd. 2b, of the Education Law as it plainly reads, that is, to authorize discipline by the Regents in the event of a conviction of a physician of a crime in any court of competent jurisdiction. Section 1330, *supra*, does, however, have this significance at this point: it illustrates, at least, that making a criminal offense out of a refusal to obey a legislative subpoena is in line with New York public policy, as well as that of the Federal government.

Appellants suggest that a literal construction of Section 6514, subd. 2b, will empower the Board of Regents to destroy a person, professionally, solely on a showing of the commission by him in some other state (or country) of an act which we in New York consider non-criminal, or even meritorious. Two answers are available to that: first, some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases; and, second, the offense here committed, contempt of Congress, is no mere trivial transgression of an arbitrary statute.

Turning to appellants' second main argument, we consider it impossible to read into Section 6514, subd. 2b, *supra*, a condition or qualification that, to justify professional discipline, the crime must be one involving moral turpitude (see, as to there being no moral turpitude in this offense, *Sinclair v. U. S.*, 279 U. S. 263, 299), or one related to the profession itself. The Legislature knows how to [fol. 105] state such limitations when it so desires (see, for instance, present Education Law, Section 7406, subd. 1, as to certified public accountants, and, as to physicians, compare former Public Health Law, Section 161, with present Education Law, Section 6502). Nor is this an attempt to

"enforce the criminal laws of the United States" (*People v. Welch*, 141 N. Y. 266, 275). We are enforcing our own statute, of not uncertain meaning, which simply empowers the Regents to impose a penalty upon any physician who has been convicted of a crime in any competent court anywhere. Stringent as it is, that statute needs no cutting down, for constitutionality's sake. It is no argument against the validity of this statute that it considers a criminal conviction anywhere as a showing of unfitness, for "it is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character" (*Hawker v. New York*, 170 U. S. 189, 196). A professional license is a privilege from the state, and the state can attach to its possession conditions onerous and exacting. The special equities of individual cases can be reflected in variety of punishment, as was done here, but the choice among such varieties is for the Board, not the courts (*Matter of Sagos v. O'Connell*, 301 N. Y. 212).

Somewhat similar to the argument, *supra*, that moral turpitude must be shown, is the contention that the Regents acted arbitrarily in acting on the Federal conviction alone, without regard to the moral right or wrong of what petitioners actually did, that is, refuse to obey legislative subpoenas, and without regard to their motives. Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and pur-[fol. 106] poses of these petitioners, are presumed to have taken all those things into account in fixing the penalties.

As to the assertions, by appellants, that the Regents dealt too severely with them, or that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such questions (*People ex rel. Masterson v. French et al.*, 110 N. Y. 494, 500; *People ex rel. McAleer v. French, et al.*, 119 N. Y. 502, 507; *People ex rel. Greenbaum v. Bingham*, 201 N. Y. 343, 347; *People ex rel. Morrissey v. Waldo*, 212 N. Y. 174, 179; *People ex rel. Regan v. Enright*, 240 N. Y. 194, 198, 199; *Matter of Sagos v. O'Connell*, 301 N. Y. 212, 215; Benjamin, Report to the Governor on Administrative

Adjudication, Vol. 1, pp. 170, 217; see *Jaffe v. State Board*, 135 Conn. 339, 352, 353, 354; *Williams v. New York*, 337 U. S. 241, 246 et seq.). *Matter of Tompkins v. Board of Regents*, 299, N. Y. 469, does not announce or apply any different rule as to court review of administrative discretion in measuring out discipline against physicians. In the *Tompkins* case, we reversed an Appellate Division order annulling a Regents' determination because the Appellate Division had exceeded its powers in so doing. Sending the whole matter back to the Regents, because of that error of law, we reminded the Board of the physician's fine record, etc., and suggested that such factors should be significant to the Board in again "exercising its broad discretion to frame the appropriate discipline, for the offense and for the offender". In that same connection, however, in *Tompkins*, we made it entirely clear that "the exercise of that discretion is beyond our power to review." Had [fol. 107] we not there found an error of law (not as to punishment but as to the Appellant Division's unwarranted annulment order) we could not, in the *Tompkins* case, have done other than affirm. In the present case there is no error of law, and so no basis for any interference by us.

The orders should be affirmed.

#### Opinion to Reverse

FULD, J. (dissenting):

It is "the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction." (People ex rel. Marks v. Brophy, 293 N. Y. 469, 474.) That public policy is grounded in a natural and humane abhorrence of heaping added domestic penalties upon one convicted of a crime in a foreign jurisdiction. I cannot, therefore, agree with the court's conclusion that the license of a physician may be suspended or revoked by the Regents—pursuant to section 6514, subdivision 2(b), of the Education Law—because of a conviction of a crime "without the state," when the underlying act is not of a character recognized as criminal by the laws of this state, when it has been held by the courts of the conviction jurisdiction not to involve moral turpitude and when there is no evidence reflect-

ing adversely on the licensee's qualifications to practice his profession.

Appellant Barsky and a number of others, all members of the Executive Board of the Joint Anti-Fascist Refugee Committee, were convicted under title 2, section 192, of the United States Code, of the misdemeanor of contempt of Congress, for failing to produce records of the organization, pursuant to a subpoena of a Congressional Committee [fol. 108] dueting an investigation. The conviction was affirmed—one judge dissenting—by the United States Court of Appeals for the District of Columbia (*Barsky v. United States*, 167 F. (2d) 241); a petition for a writ of certiorari was denied by the United States Supreme Court in June, 1948 (334 U. S. 843) and a petition for rehearing was denied two years later, with a notation that two of the justices were of the opinion that the petition should be granted (339 U. S. 971). Barsky served a term of five months in prison.

The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6514, subd. 4; Sec. 6517). It summarized "the issues litigated and not litigated at the criminal trial" in this way: "There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient." The Committee on Discipline noted further that the federal court had directed judgment of aequittal on a conspiracy count in the indictment.

With regard to the reasons given by Barsky and the other members of the Refugee Committee for withholding records called for by the subpoena, the Regents' Committee on Discipline wrote as follows:

"They had been advised by counsel that the subpoenas were invalid. \* \* \* They asserted that \* \* \* (none) of their activities fell within the scope of the matters into which \* \* \* the Congressional Committee was authorized to inquire. These facts,

[fol. 109] they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad', and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or who were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945 (before the subpoenas were issued), asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and pre-judgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined by the courts.

"If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (*Sinclair v. United States, supra* (279 U. S. 263)). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis."

And, commenting on the crime of which appellant was later convicted, the Regents' Committee found that "no moral turpitude" was involved. (See *Sinclair v. United States*, 279 U. S. 263, 299.)

Those findings are not here questioned; actually, they rest, in large part, on concessions of the Attorney General at the hearing before the Medical Grievance Committee.<sup>1</sup> Thus, he conceded that appellant was advised by counsel that "the subpoenas were unconstitutionally issued and that he was not legally required to respond to them"; that that opinion at that time was not "an unreasonable construction of law"; and that the same opinion "was held by many lawyers and some jurists"—indeed, by one of the federal Court of Appeals judges who heard the criminal appeal. In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair v. United States, supra*, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients.

[fol. 111] Upon such facts, it should require exceedingly plain language to cause a court to conclude that the legislature has authorized appellant's suspension from practice for six months or, indeed, as the court implies, the revocation of his license.

The court chooses to find such language in that portion of the section of the Education Law which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without the state, of a crime." It is urged that this language "is too plain to permit construction by addition of unexpressed qualifications or exceptions" (Opinion, p. 2). In that I cannot concur. Experience has taught that sheer

<sup>1</sup> It should be noted that, when the parties were before the Regents' Committee on Discipline, counsel stipulated that that Committee should consider and take into account matter not in the record of the hearing before the Medical Grievance Committee, including specifically the record of the criminal case in the federal court.

literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e. g., *People ex rel. Marks v. Brophy, supra*, 293 N. Y. 469; *Matter of Donegan*, 282 N. Y. 285; see, also *Matter of Garsson v. Wallin*, 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra*, 282 N. Y. 285, 292), we said that discipline "partakes of the nature of punishment," with the consequence that statutes imposing discipline "must be strictly construed," and, in the *Marks* case (*supra*, 293 N. Y. 469, 474), we declared, to "decreet forfeitures \* \* \* because of violations of the criminal laws of another jurisdiction," is contrary to the established "public policy of this State".

For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to. There is nothing new in the words [fol. 112] "convicted \* \* \* without this state"; the *Marks* case (*supra*, 293 N. Y. 269) dealt with virtually identical language and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agreement—*conviction of "a felony, either in New York State or any other state"*—declared (293 N. Y., at p. 474):

"The Atkins case (248 N. Y. 46, *supra*), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of 'any felony,' the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this relator should suffer a similar forfeiture if convicted of 'a felony, either in New York State or any other state' meant the same thing."

Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to war-

rant the imposition of an additional penalty in this state. It must be a particular kind of conviction.

"Felony," as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N. Y. 285) or the governor (*People ex rel. Marks v. Brophy, supra*, 293 N. Y. 469) used the word "felony", they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N. Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (Sec. 88, subds. 3, 4; sec. 477; now numbered sec. 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old sec. 88, subd. 4; present sec. 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and reasonably be presumed that our legislature, when it required disbarment for conviction of a federal "felony," considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for violations of the laws of another jurisdiction and in view of the requirement that the statute be strictly construed.

So, here, where the legislature has declared that it must be a conviction of a "crime," the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving "felony" and the one before us involving "crime"—the argument is far stronger for limiting the term "crime" than it is for limiting the term "felony." In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad "crimes" in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's "without the state," if sheer

literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—“in some other state (or country) \* \* \* which we in New York consider non-criminal, or even meritorious.”<sup>2</sup>

[fol. 114] It seems almost incredible to me that the legislature could have contemplated that such “non-criminal” or “meritorious” acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is pointed out that such “a literal construction \* \* \* will empower the Board of Regents to destroy a person” without the slightest warrant—that “some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases” (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst. v. University of State of N. Y.*, 298 N. Y. 184, 190, a “statute's validity must be judged not by what has been done under it but 'by

<sup>2</sup> The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (sec. 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) Sec. 55-103, Sec. 41-811, and see *Nations v. State*, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e. g., Ala. Code (1940) tit. 48, sec. 301 (31a); La. S. A.-C. C. (1950) Art. 45, Sec. 195; N. C. Gen. Stat. (1950) Sec. 62-121.71-72, and see *State v. Johnson*, 229 N. C. 701; S. C. Code (1952) Sec. 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) Sec. 56-329, and see *New v. Atlantic Greyhound Corp.*, 186 Va. 726). And, in Kansas, it is a crime to sell or even to drink alcoholic liquor in a public place. Kansas Gen. Stat. (1949) ch. 41-719, 803, and see *State v. Shackle*, 29 Kans. 341.)

what is possible under it.''" And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career.

As a matter of statutory construction alone, without considering whether such legislation may be constitutionally enacted, we should not attribute to the legislature a design so palpably harsh and extreme. (See *Matter of Rouss*, 221 N. Y. 81, 91, where the court declared, "Consequences cannot alter statutes, but may help to fix their meaning.") While affirmance herein may affect only appellant, the present decision has an importance that transcends and [fol. 115] reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me. As I have sought to show, the only reasonable construction—and the one required by our precedents—is that only those acts, recognized by the laws of this state as criminal in nature, are encompassed by the statute before us.

In point of fact, the Regents' Committee on Discipline suggested that the charge against appellant might be sustained upon the ground that the federal crime of which he was convicted finds its analogue in section 1130 of our Penal Law—which provides that one who willfully refuses to produce documents before the state legislature or one of its committees, is guilty of a misdemeanor. The court has found it unnecessary—in the view that it has here taken—to consider that possibility, and, that being so, I see little to be gained by discussion of the matter.

However, at least one other question remains for decision.

After noting that the courts would ultimately have to decide whether appellant's crime was one contemplated by the statute, the Regent's Committee turned to the subject of discipline and wrote that there was no basis in the facts presented for any punishment greater than censure and reprimand:

"While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline beyond the statutory minimum of censure and reprimand must, we believe, be based either on the inherent nature of the respondent's

violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline."

And it ended its report in this way:

[fol. 116] "Since violation of the Federal statute which \* \* \* (appellant) has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of \* \* \* (appellant's) explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that \* \* \* (appellant's) license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded."

The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances—made, it must be remarked, on a record less complete than the one before the Committee on Discipline.<sup>3</sup>

This court has heretofore declined, in most instances, to consider the measure of discipline imposed by an adminis-

<sup>3</sup> While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that "Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States." Reliance upon that fact, was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.)

trative agency. (But cf. *Matter of Tompkins v. Board of Regents*, 299 N. Y. 469, 476-477.) That is a subject, we have concluded, that rests in the discretion of the agency. However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory [fol. 117] authority of the Regents is, in truth, as the court here holds,<sup>4</sup> so broad, so unrestrained, then, I venture, the statute transceeds constitutional limits.

It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent, or dishonest practitioners of medicine or of plumbing is, of course, for the legislature to decide. But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos v. United States District Court*, 19 F. (2d) 722.)

In sum, then, the court's construction of the Education Law provision, particularly when taken with its grant to the Board of Regents of uncontrolled discretion, not only as to the matters on which they may rely in reaching a determination but also as to the measure of discipline, places the statutory scheme beyond the bounds of what

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<sup>4</sup> In the course of its opinion, the court has written (Opinion p. 6):

"As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to review such questions." (Emphasis supplied.)

is permitted to the legislature. To me, it seems not merely delegation run riot but legislative abdication. A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may [fol. 118] be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to “the good sense and judgment” of the Regents, but, while “good sense and judgment” are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that “crime” has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss “of all that makes life worth living”. (*Ng Fung Ho v. White*, 259 U. S. 276, 284.) Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small v. Moss*, 279 N. Y. 288, 299, we declared that “The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,” and in *Packer Collegiate Inst. v. University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we stated that “there must be a clearly delimited field of action and, also, standards for action therein.” (See, also, *Niemotko vs. Maryland*, 340 U. S. 268, 273; *Matter of Fink vs. Cole*, 302 N. Y. 216, 225.) The wisdom of that constitutional safeguard is highlighted by its disregard in this case.

For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall.

(U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this Court, prevent any other conclusion.

I would reverse.

Others affirmed, opinion by Desmond, J., in which all concur except Fuld, J., who dissents in an opinion.

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[fol. 120] IN COURT OF APPEALS OF STATE OF NEW YORK

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of February in the year of our Lord one thousand nine hundred and fifty-three, before the Judges of said Court.

Witness, the Hon. John T. Loughran, Chief Judge Presiding. Raymond J. Cannon, Clerk.

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[fol. 121] In the Matter of the Application of DR. EDWARD K. BARSKY, Appellant

For a Review under Article 78 of the Civil Practice Act, of the determination of The Board of Regents of the University of the State of New York, &c., Respondent.

REMITTITUR—February 27, 1953

Be it remembered, That on the 5th day of August in the year of our Lord one thousand nine hundred and fifty-two, Dr. Edward K. Barsky, the appellant in this cause, came here unto the Court of Appeals, by Abraham Fishbein, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The Board of Regents of the University of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Paxton Blair, of counsel for the appellee,

lant, and by Mr. Henry S. Manley, of counsel for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 122] Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justice thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York. Court of Appeals, Clerk's Office, Albany, February 27, 1953.

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Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 123] IN COURT OF APPEALS OF STATE OF NEW YORK  
Present: Hon. Edmund H. Lewis, Senior Associate Judge,  
Presiding

[Title omitted]

ORDER DENYING MOTION FOR REARGUMENT, GRANTING STAY  
AND AMENDING REMITTITUR—April 16, 1953

A motion for reargument, for a stay of all proceedings pending a direct appeal or a petition to the Supreme Court of the United States for certiorari, and to amend the remittiturs in the above causes having been heretofore made

upon the part of the appellants herein, and papers having been submitted theron and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further ordered, that the said motion, insofar as it seeks a stay of all proceedings pending a direct appeal, or a petition to the Supreme Court of the United States for certiorari, be and the same hereby is granted, and it is

[fol. 124] Further ordered, that the said motion, insofar as it seeks to amend the remittiturs, be and the same hereby is granted by adding thereto the following:

Upon the appeals herein there were presented and necessarily passed upon questions under the Federal Constitution, viz., whether sections 6514 and 6515 of the Education Law, as construed and applied here, are violative of the due process clause of the Fourteenth Amendment. This Court held that the rights of the petitioners under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied.

(Sgd.) Gearon Kimball, Deputy Clerk. (Seal.)

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[fol. 125] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

PETITION FOR APPEAL—May 5, 1953

Considering himself aggrieved by the final order and judgment of this Court entered on the 26th day of February, 1953, petitioner-appellant Dr. Edward K. Barsky herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final order and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said petitioner-appellant pending the final disposition of this appeal and that the amount of security be fixed in the sum of \$250 by the order allowing the appeal and that the material parts

of the record, proceedings and papers upon which the said final order and judgment were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided; that upon the allowance of said appeal, and the filing and approval of the appeal bond by this Court, that said mandate, order and judgment of this Court entered on February 26, 1953 and the suspension of the medical license of petitioner-appellant Dr. Edward K. Barsky, be stayed in all respects [fol. 126] pending the final disposition of said appeal.

Respectfully submitted, Abraham Fishbein, Counsel for Petitioner-Appellant, Dr. Edward K. Barsky.

Dated: New York, May 5, 1953.

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[fol. 127] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—May 7, 1953

Dr. Edward K. Barsky, petitioner-appellant, having made and filed his petition for an appeal to the Supreme Court of the United States from the final order and judgment of this Court in this cause, entered on the 26th day of February, 1953, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal and his statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is fixed in the sum of \$250. with good and sufficient surety and shall be conditioned as may be required by law, and that the mandate, judgment and order of this Court, and the suspension of the medical license of the appellant Dr. Edward K. Barsky be and is suspended and stayed until the final termination of said appeal to the Supreme Court of the United States.

[fols. 128-130] It is further ordered that citation shall issue in accordance with law.

Dated: Albany, New York.  
May 7, 1943.

Edmund H. Lewis, Chief Judge of the Court of Appeals.

[fols. 131-133] Citation in usual form showing service on Henry S. Manley omitted in printing.

[fols. 134-138] Cost Bond on appeal for \$250.00 and filed May 7, 1953, omitted in printing.

[fol. 139] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—May 6, 1953

Dr. Edward K. Barsky, petitioner-appellant in the above entitled cause, in connection with his appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which he will rely in his prosecution of said appeal from the final order and judgment of the Court of Appeals of the State of New York, entered on February 26, 1953.

The Court of Appeals of the State of New York erred:

(1) In refusing to hold that Appellant was deprived of the guarantee of due process by a construction of the undefined word "crime" in Section 6514 (2b) of the New York State Education Law, so unlimited in scope, that the New York medical licenses of Appellant and all New York physicians are subject to suspension or revocation upon conviction "anywhere" in the world of an act that is deemed an offense there but that is not an offense or may be "even meritorious" in New York.

[fol. 140] (2) In refusing to hold that Appellant was deprived of his liberty and property without due process, by such a construction of the word "crime" in Section 6514 (2b) of the New York State Education Law, that the New York medical license of the Appellant was suspended for six months upon his conviction in the Federal Court of the District of Columbia, of an act that was only deemed an offense there, but that was not an offense under the laws of New York.

(3) In holding that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, do not violate the due process clause of the Fourteenth Amendment or the constitutional guarantees against double jeopardy and double punishment, by the addition of the domestic penalty of a six months' suspension of Appellant's New York medical license to the six months' jail sentence Appellant has already served for his conviction in a jurisdiction outside of New York, of an act that admittedly involves neither moral turpitude nor intellectual unfitness and that is not an offense in New York.

(4) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, violate the constitutional guarantees against double jeopardy and double punishment, and deprived Appellant of due process, by serving as the basis for the suspension of Appellant's New York medical license for six months, by reason of his conviction in a jurisdiction outside of New York for an act that is not related to the practice of medicine.

(5) In refusing to hold that the fact that a "crime", mentioned in Sections 6514 and 6515 of the New York State Education Law, "has been committed *somewhere*, is too [fol. 141] vague, too capricious, too unrelated to anything that a citizen" of New York "is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally" (dissenting opinion), and that therefore Appellant was deprived of his liberty and property without due process.

(6) In refusing to hold that Sections 6514 (2b) of the New York State Education Law on its face and as construed and applied, with particular reference to the undefined

word "crime" therein, is so vague and its meaning so uncertain, that the enforcement of that statute violated the right to due process guaranteed to Appellant by the Fourteenth Amendment.

(7) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, violate the constitutional precept against legislative abdication, by leaving only to the "good sense and judgment" of the Appellee, without any other "standards", those foreign offenses that are not offenses in New York, for the conviction of which Appellee may institute disciplinary proceedings and impose a suspension or revocation of a New York medical license, including the suspension of Appellant's medical license.

(8) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, violate the constitutional precept against legislative abdication, by leaving the type of punishment to be imposed by the Appellee upon the Appellant and all New York physicians convicted of an offense "anywhere", to the good sense and judgment" and the unfettered discretion of the Appellee, without guide-posts or standards correlating the type of punishment with the type of offense.

[fol. 142] (9) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face, and as construed and applied, violate the constitutional guarantee against legislative abdication by giving the Appellee unlimited, arbitrary power to suspend or revoke a medical license, including the power to suspend Appellant's license for six months, upon the physician's foreign conviction of an act that is not related to the medical practice, or to the regulation of the medical practice in the interests of the public of New York State, that involves neither moral turpitude nor intellectual unfitness, and that is not an offense in New York.

(10). In refusing to hold that Sections 6514 and 6515 of the New York State Education Law as construed and applied, deprive Appellant of due process by making Appellant's conviction in a jurisdiction outside of New York an automatic "professional fault" despite the fact that the

statutes provide for a hearing on the merits to ascertain whether Appellant is guilty or not guilty.

(11) In failing to hold that to construe the hearing mentioned in Sections 6514 and 6515 of the New York State Education Law as being limited to a hearing before a sentencing judge and solely for the purpose of taking testimony relating to the punishment to be imposed and not as to Appellant's actual guilt or innocence, deprived Appellant of a real and judicial hearing, and of the guarantee of due process.

(12) In refusing to hold that Appellant was deprived of due process and a fair hearing by reason of the admission in evidence of and the predication of a finding by Appellee on, the listing of the Joint Anti-Fascist Refugee Committee [fol. 143] on the United States Attorney General's subversives list.

(13) In refusing to hold that Appellant was deprived of due process and a fair hearing, by reason of the admission in evidence of the judicial dismissal of the complaint of the Joint Anti-Fascist Refugee Committee against the listing of that organization on the United States Attorney General's subversives list, and in disregarding the subsequent reversal thereof and the holding in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.

(14) In refusing to hold that Appellant was deprived of his liberty and property without due process and of a real, judicial "hearing on the merits" under Sections 6514 and 6515 of the New York State Education Law, because the Appellee upon the hearing admittedly "ignored weighty considerations and acted upon matters not proper for consideration" (majority opinion), including "the gross and prejudicial error" (notes 3 and 4 in dissenting opinion), in connection with the listing and the reversal mentioned in the assignments of error numbered 12 and 13.

(15) In refusing to hold that Appellant was deprived of his liberty and property without due process, by the denial of his right to judicial review of a hearing in which the Appellee admittedly "ignored weighty considerations and acted on matters not proper for consideration," and committed "gross and prejudicial error".

(16) In refusing to hold that Appellant was deprived of

due process by the denial of his right to judicial review of the arbitrary, unreasonable and oppressive six months' suspension of Appellant's medical license, imposed by the [fol. 144] Appellee despite and in disregard of a report of Appellee's own Committee on Discipline that on the record there was no valid basis for the imposition of more than the statutory minimum of a censure.

(17) In failing to hold that Sections 6514 and 6515 of the New York State Education Law, as construed and applied, deprived Appellant of and violated the guarantees of, equal protection and due process, by imposing the arbitrary, oppressive, severe and unreasonable penalty of a six months' suspension of his New York medical license on top of the six months' jail sentence served because of Appellant's test of the validity of the legislation and acts resulting in his conviction in the Federal Court in the District of Columbia.

(18) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, deprived Appellant of due process, by the conflicting, unreasonable, arbitrary and oppressive constructions thereof whereby the licenses of New York physicians are not subject to suspension or revocation under Section 6514 on conviction of a felony outside of New York that is not a felony in New York, but are subject to suspension or revocation under the same Section 6514 on conviction outside of New York of the lesser offense of a misdemeanor that is similarly not an offense in New York.

(19) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law as construed and applied are arbitrary, unreasonable and oppressive class legislation bearing no relationship to the regulation of the medical practice in the interests of the public of New York State. [fol. 145] (20) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law, are arbitrary, unreasonable and discriminatory class legislation, discriminating without rational basis, in favor of physicians convicted outside of New York of felonies that are not felonies in New York, and against physicians convicted outside of New York of lesser offenses that are not offenses in New York.

(21) In failing to hold that Sections 6514 and 6515 of the New York State Education Law were employed by the Appellee as bills of attainder against the Appellant, to inflict punishment upon him for matters unconnected with the medical practice, and for past, lawful associations, and without a judicial hearing on the merits, and by fixing the amount of punishment by an arbitrary and capricious disregard of the evidence and of the report of its own Committee on Discipline.

(22) In failing to hold that Sections 6514 and 6515 of the New York State Education Law as construed and applied, disregard the constitutional precept that a State cannot impose a domestic penalty, including the suspension of Appellant's medical license, for acts outside New York, in the District of Columbia, where the Congress and the United States have the sole power of legislation and exclusive jurisdiction.

(23) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law, as applied, disregard Title 18 U. S. C. Section 402, a law of the United States, and thus violate Article VI of the Constitution.

(24) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law, as applied, disregard the constitutional differentiation between a Law and a Resolution contained in, and therefore violate, Article 1 Section 7 of the Constitution.

[flos. 146-148] (25) In holding that the meaning of "crime" as used in Section 6514 (2b) of the New York State Education Law, is clear and definite and does not (despite the absence of legislative or administrative standard for application except the "good sense and judgment" of the Appellee) amount to legislative abdication with authority to Appellee to determine its meaning and the limits of its application, and does not deprive Appellant of due process.

(26) In refusing to set aside and annul the determination suspending Appellant's medical license for six months.

Wherefore Petitioner-Appellant prays that the order and judgment of the Court of Appeals of New York State entered February 26, 1953, be reversed, the determination

annulled, and for such other relief as the Court may deem proper.

Dated: New York, May 6th, 1953.

Abraham Fishbein, Counsel for Petitioner-Appellant.

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[fols. 149-155] STATEMENT REQUIRED BY PARAGRAPH 2 RULE 12 OF THE RULES OF THE SUPREME COURT—(Omitted in Printing)

---

[fols. 156-158] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

STIPULATION WAIVING PRINTING OF THE MINUTES AND EXHIBITS—May 6, 1953

It is stipulated that printing of the stenographic minutes of the hearings before the appellee and of the exhibits submitted upon said hearings, are waived and the typewritten minutes, and the exhibits may be submitted to the Supreme Court of the United States in their original form and may be referred to and used in the briefs of the parties and by the United States Supreme Court for decision, as fully as though printed.

Dated: May 6, 1953.

Abraham Fishbein, Counsel for Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Appellee.

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[fols. 159-164] PRAECLYPE (omitted in printing)

## [fol. 165] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF PARTS OF THE RECORD TO BE PRINTED—Filed May 13,  
1953

Appellant adopts his Assignment of Errors heretofore filed herein, as his Statement of the Points to be relied upon in his appeal to this Court.

Appellant designates the following portions of the Record filed herein, for printing by the Clerk of this Court.

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The parties have waived printing of the stenographic minutes of the hearings before the Appellee and have further waived printing of the Exhibits submitted upon said hearings. The parties have agreed that the typewritten minutes and Exhibits may be submitted to the Supreme Court of the United States, in their original form, and may be referred to and used in the briefs of the parties, and by the United States Supreme Court for decision, as fully as though printed.

Dated: New York, May 7, 1953.

Abraham Fishbein, Counsel for Appellant.

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[fol. 168] [File endorsement omitted.]

[fol. 169] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1953

No. 69

DR. EDWARD K. BARSKY, Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF  
NEW YORK

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

The Chief Justice took no part in the consideration or decision of this question.

(1341)

FILED

MAY 13 1905

WILFRED A. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

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No. 69

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DR. EDWARD K. BARSKY

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK

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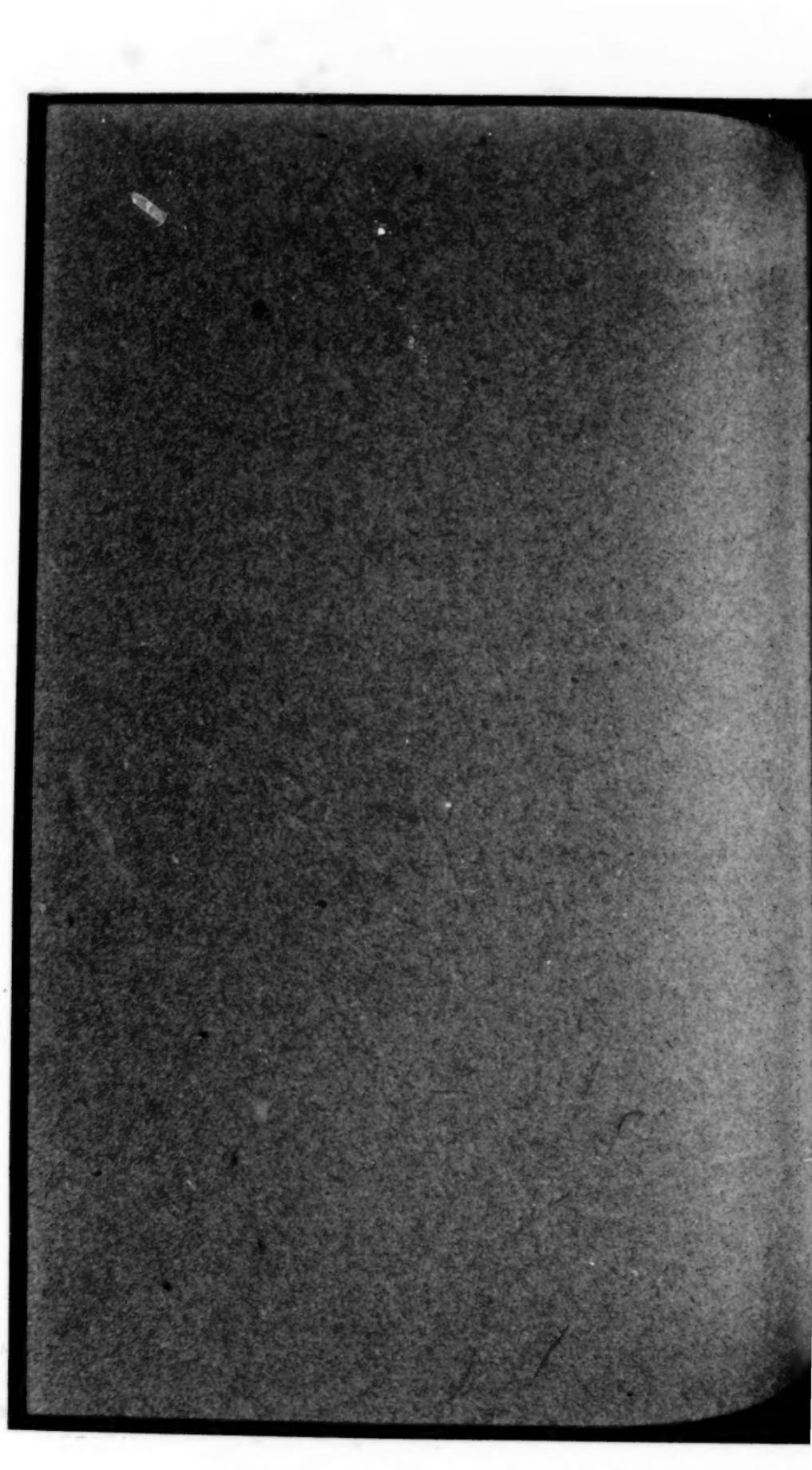
APPEAL FROM THE COURT OF APPEALS OF THE STATE OF  
NEW YORK

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STATEMENT AS TO JURISDICTION

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ABRAHAM FRIEDMAN,  
*Counsel for Appellant.*



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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1953

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**No. 69**

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DR. EDWARD K. BARSKY

*vs.*

*Appellant,*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK

---

**STATEMENT AS TO JURISDICTION**

---

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, petitioner-appellant submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or order of the Court of Appeals of the State of New York made in this cause on February 26, 1953.

**Dates of Judgment Sought to Be Reviewed and of This Appeal**

The judgment and order of the Court of Appeals of the State of New York sought to be reviewed, affirmed the order of the Appellate Division of the Supreme Court for the Third Judicial Department. The majority and dissenting opinions of the Judges of the Court of Appeals, and the judgment and order of that Court, were filed on February 26, 1953. The remittitur of the Court of Appeals was issued

to the Supreme Court of the State of New York, Albany County on February 27, 1953. Application for re-argument was made on March 5, 1953 and was denied on April 16, 1953, and at the same time the Court of Appeals granted Appellant's motion for a stay pending an appeal to the Supreme Court of the United States, and to amend the remittitur by the inclusion of a certificate that federal, constitutional questions had been raised and passed upon.

The application for appeal to the United States Supreme Court was presented to and signed by the Chief Judge of the Court of Appeals of the State of New York on May 7, 1953.

The Court of Appeals of the State of New York is the state court of last resort. Its judgment in this case is both final in form and substance and disposes of all of the elements of the controversy in the Court below.

#### **Opinion Below**

The opinion of the Court of Appeals of the State of New York in this cause is reported in 305 N.Y. 89. A copy of the opinion is attached hereto as Exhibit "A". The opinion of the Appellate Division of the Supreme Court of the State of New York for the Third Department in this cause is reported in 279 App. Div. 1117 and a copy is attached as Exhibit "B". Said opinion Exhibit "B", states it was based upon the authority of a decision of the said Appellate Division in the cause heard prior to this cause, and reported in 279 App. Div. 447. A copy of the opinion in the prior cause is attached as Exhibit "C". The opinion of the Appellee's Committee on Discipline is contained in the printed Record on Appeal (fols. 111-193).

#### **The Statutory Provision Sustaining Jurisdiction**

This cause was instituted to review the Appellee's suspension of the Appellant's medical license and permission

to practice medicine in New York State, for six months. The Appellee acted under authority purportedly conferred by Sections 6514 and 6515 of the New York State Education Law. The Appellant drew into question the validity of the statutes on the ground that they were repugnant to the Constitution of the United States on their face and as construed and as applied. The decision of the highest Court of the State of New York in this cause was in favor of the challenged statutes.

The jurisdiction of the Supreme Court of the United States to review the judgment and order by direct appeal is conferred by Title 28 of the United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court: *Hamilton v. Regents of the University of California*, 293 U.S. 245; *Senn v. Tile Layers Union*, 301 U.S. 468; *Lorell v. City of Griffin*, 303 U.S. 444; *People ex rel. McCollum v. Board of Education*, 333 U.S. 203; *Winters v. N.Y.*, 333 U.S. 507.

### **The Statutes Involved**

The validity of the following statutes is involved: New York State Education Law, Sections 6514 and 6515. The statutes permit revocation of a physician's medical license, upon his conviction "in a court of competent jurisdiction, either within or without this state, of a crime". The statutes are set out verbatim in Exhibit "D".

Appellant contends and contended in this case, that the statutes referred to are on their face, and as construed and applied, repugnant to the Constitution of the United States. The decision rendered by the Court below, was in favor of their validity.

### Statement as to the Nature of the Case \*

Appellant is a physician and surgeon of some thirty years of the highest standing in his profession and in his community. On September 28, 1951 the Appellee suspended Appellant's medical license for six months by reason of his conviction in 1947 in the United States District Court, for the District of Columbia, for failure to produce before the House Un-American Activities Committee, subpoenaed records of a charitable organization known as the Joint Anti-Fascist Refugee Committee, of which Appellant occupied the unsalaried post of chairman.

Appellant, and other members of the executive board of the organization, among whom were a number of physicians, were indicted on two counts; one for conspiracy to fail to produce the records, and the other for failure to produce them. On the trial, the then attorneys for the Appellant and the others indicted, delimited themselves to the constitutional issues involved. As the dissenting opinion noted:

"The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6514, subd. 4; Sec. 6517). It summarized 'the issues litigated and not litigated at the criminal trial' in this way: 'There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or

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\* The designation "S.M.p." refers to the pages of the typewritten stenographic minutes of the hearings held before the Appellee. By stipulation, printing of these minutes was dispensed with; they were handed up to the Court of Appeals together with all exhibits introduced at the hearings.

The designation "fols." refers to folios of the printed record.

control of the records were legally insufficient.' The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment." Exhibit A pages 59-60.

Appellant was acquitted of conspiracy not to produce the books. Yet he was convicted of failure to produce the books which admittedly he did not have possession, of which

Attorney General of New York acknowledged the executive secretary "was the legal custodian" and of which the executive secretary, who had possession, was also later convicted. Appellant's conviction was affirmed, one judge dissenting (*Barsky, et al. v. U. S.*, 167 F. 2d 241); certiorari was denied in June, 1948 (334 U. S. 843) and rehearing was denied two years later with a notation that two of the Justices were of the opinion that the petition should be granted (39 U. S. 971). Appellant was sentenced to six months. He actually served five months in prison, thus suffering at the same time an actual suspension of his medical license for those five months.

Following Appellant's conviction, the Appellee in 1948, commenced proceedings against Appellant to revoke his medical license under Sections 6514 and 6515 of the New York State Education Law, on the ground that he had been convicted of a crime. Appellant interposed an answer in which he detailed claimed violations of the Federal Constitution, and set forth defenses on the merits. A copy of the charges and answer are contained in the aforementioned handwritten stenographic minutes at pages 4-28. On the hearing before the Appellee's Sub-Committee of the Medical Grievance Committee, Appellant offered evidence on the merits to show that although he had been found guilty in the narrowly limited criminal trial, he was not actually guilty, and that no moral turpitude was involved. As the Appellee's Committee on Discipline later stated: "Re-

spondent's (Appellant's here) motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here" (fol. 48).

The evidence adduced before the Appellee, was uncontradicted. In 1942, the Joint Anti-Fascist Refugee Committee was formed to aid some 500,000 refugees who fled from Spain after the Franco victory. Documentary evidence showed these men, women and children were homeless, ill, undernourished, some without arms or legs, some blind and some having to be carried over the Pyrenees into France. Dr. Joy, the Director of the Unitarian Service Committee which distributed the funds for the Refugee Committee in France, testified that "of the Spanish Republican refugees concerned, only a small proportion were Communists" (fol. 185). The organization raised over a million dollars from 1942 to 1947, besides clothing and similar relief in kind. It distributed this money and relief to other organizations like the Quakers, the Unitarians, the Christian Board of Missions, and the Committee in Mexico, all of whom handled the actual disbursing of the funds and the relief in kind, and who used the money to build and maintain hospitals in France and Mexico, a convalescent home, a rest home for tubercular and undernourished children, and to provide medical aid, food, clothing and shelter. As the Appellee's Committee on Discipline wrote: "there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion" (fol. 184).

The organization had a paid, executive secretary who, the Attorney General of New York acknowledged, "was the legal custodian" of its books (S. M. p. 370). Appellant served as chairman, without remuneration, and within the limited time his active practice permitted (S. M. p. 222).

organization was concededly licensed by and rendered  
orts to the President's War Relief Control Board. It  
eived complete tax exemption as a charitable organiza-  
n from the Treasury Department. The money it sent the  
akers for relief in Africa, for example, was cleared  
ough and approved by the State Department and the  
ederal Reserve Bank. Some of the relief obtained by the  
anization was distributed in conjunction with the United  
nations Relief and Rehabilitation Association. Its relief  
s recognized by the French Government. In some cases  
as called upon for aid by the U. S. State Department.  
newspapers like the New York Times and the Herald  
bune carried editorials praising the organization and  
uesting funds for it (S. M. p. 296). Eminent persons  
m all walks of life and all professions, supported its  
orts (S. M. p. 220-1; 280; 297-8). The Attorney General  
New York conceded that at the time "the various gov-  
ernments throughout the world had ceased relations with  
Franco regime" (S. M. p. 219).

On about December 1, 1945 the House Un-American Activ-  
is Committee, without any notice to the organization,  
empted to have the War Relief Control Board revoke the  
anization's license. The request was refused. The  
ouse Committee then served a subpoena upon the execu-  
tive secretary for the production of records including the  
names of the contributors to and recipients of the charity of  
the organization. It served a similar subpoena upon Appel-  
ant although he did not have such custody. The executive  
board voted to refuse to turn over its books to Appellant; one  
of their reasons was that the secretary who had possession  
had already been served. The Appellant and the organiza-  
tion were then faced with a problem of trust; having been  
trusted with these names, they were fearful that reveal-  
ing them would cause financial and other harm to the con-

tributors, and would cause imprisonment and execution of those families of the contributors and recipients who were still in Spain. That their fears were reasonable was borne out later by the fact that even before the aforementioned indictments, testimony given by one of the board members of the organization before the House Committee, found its way to a newspaper in Spain. Had the names of the contributors and recipients been included in that testimony, their families in Spain would have been imprisoned and executed.

Appellee's Committee on Discipline wrote:

"The Attorney-General formally conceded that respondent 'was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them'; that the opinion on the constitutional question held by respondent's counsel 'was held by many lawyers and some jurists'; that there were 'expressions in some legal journals' that the subpoenas were illegal; and that such an opinion was held by one of the Judges of the Court of Appeals before which the case came up on appeal. Later the Attorney-General stated:

'I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part';

'I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable.'

Second, as bearing on the motives of respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney-General made the following concession:

\* \* \* I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the

conduct of the House Committee on Un-American Activities at the time.'

"The Attorney-General conceded further that Congressmen were included among the 'people of prominence' who held such views, and that there were Congressmen who at that time made speeches 'against the activities of (the Congressional Committee) against its procedure and otherwise.'

"The principal reasons given by respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad,' and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December

1, 1945, asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might, if necessary be determined by the courts.

"If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (*Sinclair v. United States, supra*). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record, discloses no such basis.

"A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But there is no such evidentiary showing. It may be that some of those connected with the Refugee Committee, perhaps respondent among them, had Communist affiliations, and it may be that through them the Refugee Committee was led into some unspecified subversive activity; but there is no legal evidence to support these hypotheses, and conjecture cannot take the place of evidence." (fols. 171-82).

\* \* \* \* \*

"There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. Dr. Joy testified also that, of the Spanish Republican refugees concerned, only a small proportion were Communists. There is evidence also in Respondent's Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board did, in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.

"There is ground also for conjecture, favorable to respondent's (appellant here) position, as to how the situation eventuating in the criminal trial may have arisen. It appears from testimony in the criminal trial by Congressman Wood, Chairman of the Congressional Committee, that the Congressional Committee had received complaints about the Refugee Committee, most of which 'simply complained that they engaged in political propaganda'. Since the Refugee Committee was engaged in raising money for the relief of Spanish Republicans, it is natural that some of its literature, and some of the speeches at meetings and on street corners, should have been anti-Franco and pro-Spanish-Republican; \* \* \*. It may well be that this might have been thought to be a violation of the condition of the Refugee Committee's license from the President's War Relief Control Board that it should engage solely in relief and not in political action or propaganda; \* \* \* the Refugee Committee's license was not revoked. But assuming that such literature and statements are to be

considered propaganda (rather than an incident of fund-raising), there is no showing that it was un-American or subversive propaganda, since the official position of the United States was then anti-Franco." (fols. 184-9).

As a sample of the opinion of the time, the record contains this excerpt from 14 Chicago Law Review 256, 261:

"Few subpoenas have ever been so broad as the one recently issued by the House Committee against the Joint Anti-Fascist Refugee Committee. The courts have always found some restriction as to time and subject matter. Here there is none. It should occasion little surprise then if the subpoena issued by the House Un-American Activities Committee were to be declared invalid." (S.M. p. 309).

The record also contains an excerpt from 60 Harvard Law Review 1193 concluding that:

"Nothing in recent years has been as Un-American as the conduct of the hearings of the Congressional Committee on Un-Americanism." (S.M. p. 313).

The record indicates that as Appellant testified and as an article in 47 Columbia Law Review 416, noted, this was a "test case"; this was the first time the issue had arisen as to whether the activities of the House Committee were constitutional (S.M. p. 235, 308). The uncontradicted testimony indicates beyond doubt that Appellant had compelling moral and legal reasons for his position.

Appellant answered all questions asked of him by the House Committee. However, because the executive secretary, who had the books, did not produce them, Appellant and the others, as well as the executive secretary, were indicted and convicted as mentioned.

On April 25, 1951, the Sub-Committee of Medical Grievance Committee which first heard the matter, recommended

a three months' suspension. The Attorney-General of New York had adduced testimony over objection that the organization had been placed on the United States Attorney General's subversives list (and then only after Appellant's conviction) and that the dismissal of the complaint of the organization against the Attorney General in connection with that listing, had, at the time, been affirmed by the Circuit Court (S.M. p. 399). The Sub-Committee of the Medical Grievance Committee plainly made that listing a prime, if not the sole basis, of its finding (fol. 98). Later, however, the United States Supreme Court reversed and upheld the complaint of the organization in connection with the listing (Joint Anti-Fascist Refugee Committee v. McGrath 341 U. S. 123). On April 25, 1951 the entire Medical Grievance Committee, which did not hear any of the testimony, recommended, by a vote of six to four, a six months' suspension. On July 31, 1951 the Regent's Committee on Discipline which heard and reviewed the matter, wrote a lengthy opinion (fol. 111-193) in which doubt was expressed as to the jurisdiction of the Appellee and in which it stated it was taking jurisdiction to enable the Court to pass upon the matter (fol. 149). The Committee further found that there was no contradiction whatsoever as to the motives or any of the other testimony involved, and concluded Appellant had adopted "the traditional method" (fol. 179) of testing the constitutionality of the House Committee's course. *Sinclair v. U. S.* 279 U. S. 263, 299.

The Committee concluded:

"We disagree with the Attorney-General's position, \* \* \* reflected in the findings of the Medical Committee on Grievances, that, because respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts, that he may now be disciplined on the assumption that facts not shown by evidence to have

existed might have been disclosed had the records been produced.

"Since violation of the Federal Statute which respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded." (fols. 191-3).

The Regents rejected the detailed report and recommendation of their own Committee on Discipline, and on September 8, 1951 voted to accept the recommendation of the Medical Grievance Board and imposed a six months' suspension without hearing any witnesses or attorneys. The dissenting opinion pointed out, Exhibit A pages 66-67:

"The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances—made, it must be remarked, on a record less complete than the one before the Committee on Discipline. While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that 'Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States.' Reliance upon that fact was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted

gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123)."

Appellant then instituted a proceeding to review that determination in the Supreme Court of the State of New York, Albany County. The matter was duly transferred on November 8, 1951 to the Appellate Division of the Supreme Court, Third Department, which in this case was the court of first instance. Prior to the hearing on the argument, the court heard argument in the cases of Doctor Auslander and Doctor Miller, two other physicians who were members of the executive board and who had also been convicted in the Federal Court in the District of Columbia. The Court affirmed the determination here, on the basis of its opinion in the prior case. The Appellate Division, Third Department then granted leave to appeal (279 App. Div. 1122) on the ground that a question of law was involved which should be passed on by the Court of Appeals. On February 26, 1953 the Court of Appeals affirmed the determination in all three cases. The majority opinion was written by Judge Desmond. The dissenting opinion was written by Judge Fuld. Re-argument was sought on March 5, 1953 and was denied on April 16, 1953, at which time the Court of Appeals granted Appellant's motion for a stay of all proceedings pending an appeal to the United States Supreme Court, and further granted a certificate that federal constitutional questions were raised and passed upon. The petition for an appeal to the Supreme Court of the United States was presented to the Chief Judge of the Court of Appeals and signed on May 7th, 1953. There is no further appeal or proceeding which can be taken in this cause in the Courts of the State of New York. The final disposition of the cases of Doctor Auslander and Doctor Miller are being held in abeyance pending the outcome of this appeal.

**The Constitutional Questions Involved: The Manner in  
Which the Questions Were Raised and the Decision in  
Favor of the Validity of the Statutes.**

The constitutional questions involved in this appeal are:

1. Are the statutes under which Appellant's medical license was suspended, so vague, ambiguous, indefinite and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment?
2. Do the statutes on their face, and as construed and applied, violate the due process clause of the Fourteenth Amendment and the constitutional prohibitions against double jeopardy and double punishment, by predicated the suspension or revocation of a New York medical license upon the extraterritorial conviction of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine?
3. Do the statutes on their face, and as construed and applied, violate the constitutional precept against legislative abdication, without guide-posts or standards, in connection with the crimes, the punishments, the hearings, and the evidence, depriving Appellant of a judicial hearing and the guarantee of due process?
4. Are the statutes as construed and applied, discriminatory, arbitrary and oppressive class legislation, violative of the constitutional provision for equal protection and do they constitute bills of attainder?
5. Do the statutes violate the precept that States may not impose domestic penalties for occurrences in Washington, D. C. where the United States has exclusive jurisdiction and exclusive power of legislation?
6. Do the statutes as applied, disregard Title 18, U.S.C.

section 402, a law of the United States, and thus violate Article VI of the Constitution?

7. Do the statutes as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and thus violate, Article 1 section 7 of the Constitution?

The constitutional questions were raised in Appellant's answer to the charges served by the Appellee. The answer alleges that the statutes "violate the Federal Constitution" and "the due process clause thereof"; that they are "vague, uncertain and indefinite" and permit double punishment despite the "absence of moral turpitude" and though the act "was not and is not connected with respondent's practice of medicine" and "is not a crime under the laws of New York;" that the statutes "contain and constitute an unlawful delegation and abdication of legislative power and function," "without any guide-posts or standards" and permit "unlimited, arbitrary, capricious and discriminatory action", so that "once the power exists, the sections are invalid irrespective of how the bodies act;" that the statutes "fail to establish an ascertainable standard of guilt or punishment"; that the statutes as "applied to the facts of this case are discriminatory" and "class legislation", and violate "the due process clause" of the Federal Constitution. Appellant further claimed that because contempt of Congress is not included in the 'Contempts Constituting Crimes' mentioned in Title 18 U.S.C. Section 402, the Appellant was not convicted of a "crime", so that the disregard of Title 18 U.S.C. section 402, was a disregard of a law of the United States, and violative of Article VI. Lastly, that since Title 2 U.S.C. section 192, under which Appellant was convicted, was the result of a Joint Resolution and not a Law, Appellant had not been convicted of "a crime under the laws of the United States", so that his suspension was the result of disregarding the constitutional differentiation

between a Joint Resolution and a Law mentioned in Article I Section 7.

The questions were also raised in Appellant's petition for review, where Appellant claimed "That Sections 6514 and 6515 of the Education Law violate the Federal and State Constitutions and are also unconstitutional as applied to the facts of the case, all as set forth in detail in said answer" (fols. 17-18). The questions were also raised on the arguments made before and in the briefs submitted to the Appellate Division of the Supreme Court of the State of New York, Third Department, which heard this cause as a court of first instance, and the Court of Appeals of the State of New York. In the Appellant's briefs before said Courts, Appellant claimed specifically in separate points with specific subdivisions and supporting authorities, that the statutes are unconstitutional on their face and as construed and applied, that they violate the due process clause of the Fourteenth Amendment, that suspending a license merely by reason of the conviction of an extra-territorial crime that is not an offense in New York, without the presence of moral turpitude or intellectual unfitness, and without any connection between the crime and the medical practice, "was the unconstitutional deprivation of petitioner's liberty without due process of law and double punishment for the same offense".

The Court of Appeals passed upon some of the questions raised and upheld the validity of the statutes. The Court of Appeals issued a certificate contained in the remittitur, to the effect that Federal constitutional questions were raised and necessarily passed upon. The Court of Appeals concluded with respect to the issue of constitutionality: "Stringent as it is, that statute needs no cutting down, for constitutionality's sake." (Exhibit A, page 57). The dissenting opinion of Judge Fuld stated with respect to the

constitutional issues: "In sum, then, the court's construction of the Education Law provision, particularly when taken with its grant to the Board of Regents of uncontrolled discretion, not only as to the matters on which they may rely in reaching a determination but also as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the legislature. To me, it seems not merely delegation run riot but legislative abdication. A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to 'the good sense and judgment' of the Regents, but, while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that 'crime' has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living.' (*Ng Fung Ho v. White*, 259 U. S. 276, 284.) Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small v. Moss*, 279 N. Y. 288, 299, we declared that 'The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,' and in *Packer Collegiate Inst. v. University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we

stated that 'there must be a clearly delimited field of action and, also standards for action therein.' (See also, *Niemotko v. Maryland*, 340 U. S. 268, 273; *Matter of Fink v. Cole*, 302 N. Y. 216, 225). The wisdom of that constitutional safeguard is highlighted by its disregard in this case.

"For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall. (U. S. 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this court, prevent any other conclusion.

"I would reverse." (Exhibit A, pages 67-69.)

The questions involved are substantial.

1. The statutes under which Appellant's medical license was suspended, are so vague, ambiguous, indefinite and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment.

Section 6514 (2b) of the Education Law permits suspension or revocation of a medical license upon the conviction of a New York physician "in a court of competent jurisdiction, either within or without this state, of a crime." In 1947, Appellant was convicted in the Federal Court in the District of Columbia, of failure to produce the organization's records before the House Committee. This act is deemed a misdemeanor under Title 2 U. S. C. Section 192, which does not require that the person subpoenaed have legal or other possessions of the records. There is no such offense in New York. Appellee's Committee on Discipline

noted: "default in the production of subpoenaed documents before the Congress or a Congressional Committee is not a violation of any provision of the New York Law" (fol. 142).

The word "felony" is defined in section 6514(1) by reference to section 6502, as being "any offense which if committed within the State of New York would constitute a felony under the laws thereof." The word "crime", however, is not defined in Section 6514 or 6515. According to the Court of Appeals herein, section 6514 means that if a New York physician is convicted outside of New York of what is a felony in the foreign jurisdiction but that is no offense in New York, his license cannot be revoked under subdivision 1, but if he is convicted "anywhere" in the world of an act that is a "crime" there but which in New York is either no crime or is "even meritorious," his license is subject to revocation under subdivision 2b. This position of the Court of Appeals was unprecedented and unsupported by any cited or other authority. In his dissent, Judge Fuld stated that the statute, with its meaning so fixed, is unconstitutional because: "The fact that 'crime' has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living' (*Ng Fung Ho v. White*, 259 U. S. 284). Such delegation, uncontrolled, in my judgment, as it is, violates first principles" (Exhibit A, page 68). The word "crime" has always been deemed delimited, by Section 22 of the New York Penal Law and by the declared policy of New York against domestic punishment for extra-territorial crime, to offenses committed outside of New York that are also made criminal by a New York statute. This was the position of the dissenting opinion, supported by every

known authority. It is also the plain policy of subdivision 1 of section 6514. Section 22 of the New York Penal Law (McKinney's Consol. Laws of N. Y. vol. 39, Part I, page 27) states that: "No act \* \* \* shall be deemed criminal or punishable except as prescribed or authorized by \* \* \* some statute of this state \* \* \*." *People ex rel. Blumke v. Foster*, 300 N.Y. 431, 433. The Court of Appeals herein agreed "it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction". Exhibit A page 55. Judge Fuld accordingly pointed out: "Experience has taught that sheer literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e.g., *People ex rel. Marks v. Brophy*, *supra*, 293 N. Y. 469; *Matter of Donegan*, 282 N. Y. 285; see, also, *Matter of Garrison v. Wallin*, 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra*, 282 N. Y. 285, 292), we said that discipline 'partakes of the nature of punishment,' with the consequence that statutes imposing discipline 'must be strictly construed,' and, in the *Marks* case (*supra*, 293 N. Y. 469, 474), we declared, to 'decreet forfeitures \* \* \* because of violations of the criminal laws of another jurisdiction,' is contrary to the established 'public policy of this State.'

"For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to. There is nothing new in the words 'convicted \* \* \* without this state'; the *Marks* case (*supra*, 293 N. Y. 469) dealt with virtually identical lan-

guage and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agreement—*conviction of 'a felony, "either in New York State or any other state"*—declared (293 N. Y., at p. 474):

'The Atkins case (248 N. Y. 46, *supra*), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of 'any felony,' the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this relator should suffer a similar forfeiture if convicted of 'a felony, either in New York State or any other state' meant the same thing.'

Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to warrant the imposition of an additional penalty in this state. It must be a particular kind of conviction.

"'Felony,' as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N.Y. 285) or the governor (*People ex rel. Marks v. Brophy, supra*, 293 N.Y. 469) used the word 'felony,' they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N.Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (§ 88, subds. 3, 4; § 477; now numbered § 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old § 88, subd. 4; present § 90, subd. 5) as well as under our law. *Donegan* had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and rea-

sonably be presumed that our legislature, when it required disbarment for conviction of a federal 'felony,' considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for violations of the laws of another jurisdiction and in view of the requirement that the statute be strictly construed.

"So, here, where the legislature has declared that it must be a conviction of a 'crime,' the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving 'felony' and the one before us involving 'crime'—the argument is far stronger for limiting the term 'crime' than it is for limiting the term 'felony.' In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's 'without the state,' if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—'in some other state (or country) \* \* \* which we in New York consider non-criminal, or even meritorious.'<sup>2</sup>

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<sup>2</sup> The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (§ 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) § 55-103, § 41-811, and see *Nations v. State*, 64 Ark. 487). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e.g., Ala. Code (1940) tit. 48, § 301 (31a); La.S.A.-C.C. (1950) Art.

"It seems almost incredible to me that the legislature could have contemplated that such 'non-criminal' or 'meritorious' acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is pointed out that such 'a literal construction \* \* \* will empower the Board of Regents to destroy a person' without the slightest warrant—that 'some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases' (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst. v. University of State of N.Y.*, 298 N.Y. 184, 190, a 'statute's validity must be judged not by what has been done under it but "by what is possible under it."'. And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career." (Exhibit A, pages 62-65).

Not only is the word "crime" undefined, unlimited in scope, and vague, but the meaning attributed to "felony" in subdivision (1) of the same section 6514 conflicts with the definition of "crime" (which the Court of Appeals held "includes misdemeanors as well as felonies"), in subdivision 2b. Though the same statute permits revocation of a medical license upon conviction "of a felony," the meaning of "a felony" is restricted by subdivision 1, to an act that is made a felony under New York law. If it is a felony

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45, § 195; N.C. Gen. Stat. (1950) § 62-121.71-72, and see *State v. Johnson*, 229 N.C. 701; S.C. Code (1952) § 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) § 56-329, and see *New v. Atlantic Greyhound Corp.*, 186 Va. 726.) And, in Kansas, it is a crime to sell or even to drink aleoholic liquor in a public place. (Kansas Gen. Stat. (1949) ch. 41-719, 803, and see *State v. Shackle*, 29 Kans. 341.)"

under the federal law only, the statute is inapplicable according to the authorities mentioned in the majority and dissenting opinions herein. This is so despite the fact that the physician's act may involve narcotics. (*Tonis v. Regents*, 295 N.Y. 286). In fact, the Attorney General of New York stated on page 15 of his brief in the *Tonis* case that "the test is \* \* \* whether Dr. Tonis could have been convicted in the State courts and under the State law for the offense \* \* \*." The same test was applied to an engineer's license in *Garsson v. Wallin*, 279 App. Div. 1111, aff'd. 304 N.Y. 702. Garsson had been convicted in the Federal Court in the District of Columbia of a federal felony involving moral turpitude; conspiracy to defraud the United States by reason of certain relations with a Congressman. When it was sought to revoke his engineer's license in New York on the ground that he had been convicted of "a felony", the same Appellate Division there, at the same term as here, held that although he had been convicted of a federal felony, it was not a felony in New York, and his license was not revoked, since "the offense for which respondent was convicted is related exclusively to an act against the Federal Government. There is no such crime known to the Penal Law of the State of New York \* \* \*." The Court of Appeals there affirmed. The net result is that when a physician is convicted of a federal felony involving narcotics and moral turpitude, and is charged under section 6514 (1) of the Education Law, or when an engineer is similarly convicted, and charged under section 7210 (1) of the Education Law, the word "felony", which is plainly "a crime", receives one interpretation and the benefit of the policy against domestic punishment for foreign offenses. But when a physician is convicted of what is deemed a lesser offense, namely a federal misdemeanor that admittedly is no crime in New York and that admittedly involves no moral

turpitude or intellectual unfitness, he is met with a conflicting interpretation and policy, and his license is suspended.

Not only have the New York courts heretofore without exception followed the policy and interpretation mentioned in the authorities cited by Judge Fuld, but as a consequence, they have always heretofore applied the rule against imposing domestic disqualification for foreign offenses because "one governmental authority will not enforce penalties for the criminal laws of another." *Matter of Cohen*, 164 Misc. 98, aff'd. 254 App. Div. 571, aff'd. 278 N.Y. 584. *The Antelope*, 10 Wheat. 66, 123. *Logan v. U. S.*, 144 U.S. 263, 303. *O'Brien v. Neubert*, 3 Dem. (N.Y.) 161. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 102. *Sims v. Sims*, 75 N.Y. 466. *U. S. v. Latthrop*, 17 Johns. (N.Y.) 4, 7. *People v. Jennings*, 248 N.Y. 46, 52. *People v. Stovali*, 172 Misc. 469.

The test of "literalism" employed by the Court of Appeals here, is answered in the quoted excerpt from the dissenting opinion, as well as by the Court of Appeals itself in *Matter of River Brand v. Latrobe*, 305 N.Y. 36, 43: "'a thing which is within the letter of the statute is not within the statute unless it be within the intention of the lawmakers, but a case within the intention of a statute is within the statute, though an exact literal construction would exclude it. It is a familiar legal maxim that 'he who considers merely the letter of an instrument goes but skin deep into its meaning,' and all statutes are to be construed according to their meaning, not according to the letter.' "

Further, although "crime" may sometimes include misdemeanors and mean any violation of a law, nevertheless "in common usage the word 'crime' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." Blackstone's *Commentaries* Wendell Ed. Bk. IV, Ch. 1, p. 5.

A "crime" is a "Gross violation of human law, in distinction from a misdemeanor or - - - other slight offense. \* \* \* in present usage the term is commonly applied to grave offenses \* \* \*." Webster's New International Dictionary—2nd Ed.—Unabridged—Vol. 1 pp. 625-6. The term crime is "commonly used only of grave offenses." The Oxford New English Dictionary, Vol. II p. 1172. Funk & Wagnalls New Standard Dictionary Medallion Ed. p. 614. "In a general sense the word 'crime' might mean any offense of a deep and atrocious nature as distinguished from smaller offenses known as misdemeanors." *State v. Johnson* 202 La. 926, 930-1. *State v. Scott* 24 Vt. 127, 130. Where an insurance policy was to be void if the assured's death was caused by his "criminal violation of law" and his death was caused by violations of the traffic law which were "misdemeanors", nevertheless, after reviewing the distinction between "crime" and "misdemeanor", it was held that a crime "implies a wicked or heinous act", and the recovery of insurance allowed. *Van Riper v. Constitutional Government League* 1 Wash. 2nd. 635, 639. Since admittedly the act of which Appellant had been convicted was devoid even of moral turpitude, it does not fall within the ordinarily accepted meaning of "crime". In any event, the undefined term "crime" in Section 6514 (2b), is vague, and sets forth no standard for the Appellee, namely whether Appellee is to use the definition of any violation of a law, or the commonly accepted definition, namely an offense of a more atrocious dye as distinguished from a misdemeanor. Further, is Appellee to use New York standards of whether the act is a crime or a misdemeanor, or the standards of the foreign, convicting jurisdiction, and what if the act is no crime but is meritorious in New York?

"The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punish-

ent . . . ." *Hawker v. New York*, 170 U.S. 189, 191. Because discipline "partakes of the nature of punishment" the statutes "must be strictly construed." *Matter of Donegan*, 282 N.Y. 285, 292. Cases involving such discipline, involve, as the Court of Appeals here said, "the imposition of stringent additional penalties." (Exhibit A, page 55). Because of the "grave nature" of the punishment, and the fact that a "penalty" is involved, such statutes are examined by the application of the vagueness doctrine. *Jordan v. DeGeorge*, 341 U.S. 223, 231. "The crime 'must be defined with appropriate definiteness.' \* \* \* Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act \* \* \*." *Winters v. New York*, 333 U.S. 507, 515. What is invalid, is "the exactation of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin v. Commission*, 286 U.S. 210, 243. To compel New York physicians to "live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place," as Judge Fuld noted, Exhibit A, page 68, does not delimit the application of the term "crime" but "leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." *United States v. Cohen Grocery Co.* 255 U.S. 81, 89. As Judge Fuld stated: "The fact that 'crime' has been committed *somewhere*, is too vague, too capricious, too unrelated to anything a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation \* \* \* that may destroy a person professionally." Exhibit A, page 68.

It is unreasonable to attribute to New York physicians, the reasonable expectation that conviction of any type of

offense "anywhere" in the world, that is not a crime in New York, and that is not even related to the practice of medicine, endangers their New York medical licenses. Nor did any judicial opinion heretofore rendered, ever charge them with such knowledge. Such a statute hardly falls within the "fair notice" precept, *Winters v. New York*, 333 U.S. 507, 524. It makes a New York medical license hostage to the morals and policies of the rest of the world. A statute so vague, unlimited and conflicting in form and as interpreted, as in addition to permit within the scope of its language a prohibition against the genuine testing of new constitutional issues and "seeking judicial construction" upon pain and penalty of loss of a medical license on top of the jail punishment exacted and paid for the constitutional test, is void, oppressive and repugnant to the equal protection and due process precepts. *Ex Parte Young* 209 U.S. 123, 146, 147. If a physician cannot invoke his right to test legislative acts, without the fear of losing his livelihood, in addition to the sentence served for the test, he loses the rights of a citizen. It makes the physician a cowed vassal of the state. It becomes a bill of attainder directed against physicians who would test the constitutionality of legislation or acts in pursuance thereof. It violates first and fundamental principles. To answer, as the Court of Appeals did, that the type of crimes the Appellee will select for discipline, must be left to their "good sense and judgment", Exhibit A, page 56, not only condones plain legislative abdication without standards, but as Judge Fuld stated, overlooks the precept that "'a statute's validity must be judged \* \* \* by what is possible under it.'" Exhibit A, page 65.

II. The statutes on their face, and as construed and applied, violate the due process clause of the Fourteenth Amendment and the constitutional prohibitions against double jeopardy and double punishment, by predicated the sus-

pension or revocation of a New York medical license upon the extraterritorial conviction of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine.

The Court of Appeals fixed the meaning of the statutes here so that a New York physician convicted outside of New York of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine, may nevertheless have his license suspended or revoked. The Court based its decision on the ground that "The Legislature knows how to state such limitations when it so desires." Exhibit A, pages 56-7. Judge Fuld stated: "In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair v. United States, supra*, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients." \* \* \* "It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent or dishonest practitioners of medicine or of plumbing is, of course, for the legislature to decide. But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property,

when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos v. United States District Court*, 19 F. (2d) 722.) Exhibit A, pages 61, 67.

Appellant served a jail sentence and an actual suspension for those five months from his medical practice. He now faces the additional punishment of a six months' additional suspension of practice by reason of that conviction which the Court of Appeals here agreed involves no moral turpitude. The Court of Appeals stated here: "see, as to there being no moral turpitude in this offense, *Sinclair v. U. S.*, 279 U. S. 263, 299." Exhibit A, page 56.

It is fundamental that legislation such as is involved here, must bear "a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare", that otherwise, it will "invade rights guaranteed by the Fourteenth Amendment." *Liggett v. Baldridge*, 278 U. S. 105, 111; *California Reduction v. Sanitary*, 199 U. S. 306, 318. "A state cannot 'under the guise of protecting the public, arbitrarily interfere with \* \* \* lawful occupations or impose unreasonable and unnecessary restrictions \* \* \*'" *Liggett v. Baldridge*, 278 U. S. 105, 111; *New State Ice Co. v. Liebmann*, 285 U. S. 262, 278. "The judgment of the legislature is not unfettered. The limitation upon individual liberty must have some appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." *Herndon v. Lowry*, 301 U.S. 242, 258.

If the statute "purported to \* \* \* impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment". *Douglas v. Noble*, 261 U. S. 165, 168. The statutes involved here "are designed to protect the people from the ministrations

of incompetent, incapable and ignorant persons, and to avoid the consequent harm to the health and physical well-being." *People v. Laman*, 277 N. Y. 368, 381.

Conviction of a foreign offense that New York itself has not declared in its Penal Law or elsewhere to be violative of the general welfare of the people of New York should not enable an administrative agency of New York to suspend a medical license when the sole interest of that agency is to regulate the practice of medicine in the interest of the public of New York. "If detriment to the public health \* \* \* has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced \* \* \* and none exists." *Liggett v. Baldridge*, 278 U. S. 105, 111.

Since "the right to continue" in a profession "cannot be arbitrarily taken", if the regulations "are appropriate to the calling or profession \* \* \* no objection to their validity can be raised \* \* \*. It is \* \* \* when they have no relation to such calling or profession \* \* \* that they can operate to deprive one of his right to pursue a lawful vocation." *Dent v. West Virginia*, 129 U. S. 114, 121, 122. Thus, legislation requiring the taking of an oath that the individual was not guilty of certain acts, in order to be permitted to continue in his profession, was declared invalid because "the acts \* \* \* have no possible relation to their fitness for those \* \* \* professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service \* \* \* and his fitness to preach the doctrines \* \* \* of his church \* \* \*. It is manifest upon a simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition for allowing the exercise of the professions and pursuits." *Cummings v.*

*Missouri*, 4 Wall. 277, 319, 320; *Ex Parte Garland*, 4 Wall. 333, 377, 379.

An attorney might be disciplined "If convicted of a misdemeanor which imports fraud or dishonesty". *Ex Parte Wall* 107 U. S. 265, 273. Discipline requires at least the presence of moral turpitude. "The presence of moral turpitude has been used as a test in a variety of situations including legislation governing the disbarment of attorneys and the revocation of medical licenses." *Jordan v. DeGeorge*, 341 U. S. 223, 227.

In the absence of even moral turpitude, the suspension or revocation of a medical license because of a physician's conviction of what is deemed a misdemeanor in another jurisdiction, is additional punishment for the same offense. The Court of Appeals recognized this elsewhere when it held that "Denial or revocation of a license because of guilt of an offense which tends to show moral or intellectual unfitness does not constitute punishment for this offense \* \* \*. It is only a measure of protection to the public." *Mandel v. Regents*, 250 N. Y. 173. "The disabilities created \* \* \* must be regarded as penalties—they constitute punishment." *Cummings v. Missouri*, 4 Wall. 277, 320; *Ex Parte Garland*, 4 Wall. 333, 377, 379. The Court of Appeals stated that Section 6514 "empowers the Regents to impose a penalty." Exhibit A, page 57.

But Appellant was punished once. He served a jail sentence. To punish him again by a suspension of his medical license for an extra-territorial offense devoid of moral turpitude, unrelated to his profession, and therefore unrelated to the regulation of medical practice in the public interest, is double punishment for the same offense. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense," and "no narrow or illiberal con-

struction should be given" to this precept. *Ex Parte Lange*, 85 U. S. 163, 168; *Coy v. U. S.*, 156 F. 2d 293, 295. Constitution of New York, Article 1, Section 6, in McKinney's Consol. Laws of N. Y., Vol. 2, page 95.

As Judge Fuld noted here: "For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall. (U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this court, prevent any other conclusion." Exhibit A, page 68.

III. The statutes on their face, and as construed and applied, violate the constitutional precept against legislative abdication, without guide-posts or standards, in connection with the crimes, the punishment, the hearings, and the evidence, mentioned in those statutes, and deprived Appellant of a judicial hearing and of his liberty and property without due process.

(a) As to the crimes involved in the statutes. The Court of Appeals held here, that the Appellee has unlimited power to revoke the license of a New York physician who has been convicted of a crime "anywhere" in the world. Exhibit A, page 57. As Judge Fuld noted in his dissent: "it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries \* \* \* and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the Court's opinion (p. 4)—'in

some other state (or country) • • • which we in New York consider noncriminal, or even meritorious." Exhibit A, page 64. The Court of Appeals stated plainly that there are no standards to guide the Appellee in the crimes it may choose to discipline, except the "good sense and judgment of our Board of Regents." Exhibit A, page 56. In the meantime, as Judge Fuld said, physicians "must live under the constant fear that they may be deprived of the right to practice if they offend *any* law, *any* place." Exhibit A, page 68. This fear is constant, because no time limit is involved, and what is "good sense and judgment" on the part of one Board of Regents may not be that with changing times or subsequent Boards. As the dissent point out: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action." Exhibit A, page 68. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *U. S. v. Reese*, 92 U.S. 214, 221. If the courts are thus delimited, certainly an administrative board should be, especially when its admitted function is to regulate the practice of medicine in the public interest, and not add punishment to punishment. To endow the Appellee with this "net large enough to catch all possible offenders", to permit it to use its office as a cloak to inflict additional punishment on physicians for matters unconnected with their medical practice, is to open up fields of political and other ramifications whose consequences need no belaboring. The law would become a dangerous weapon in the hands of the Appellee, and the physician a second class citizen. It is

unconstitutional "to leave room for the play and action of purely personal and arbitrary power. \* \* \* the very idea that one man may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 369.

(b) There is also complete legislative abdication with respect to the punishment. In the New York Penal Law, like the Penal Law of other jurisdictions, the legislature defined the various crimes, defined the degrees of the crimes, and fixed appropriate ranges of punishment corresponding to the particular crimes involved. Such guideposts and standards are utterly lacking here. In fact, here, the Appellee has unlimited discretion to reverse the legislative intent indicated in the Penal Laws. The statutes merely state that the Appellee may impose discipline from censure through revocation, but there is no guidepost or standard as to what crimes draw which punishments. The Appellee thus has the power to revoke a medical license for an extra-territorial crime that is meritorious in New York, and that involves no moral turpitude or intellectual unfitness. On the other hand, the Appellee may impose a mere censure upon a physician who commits a serious crime directly connected with his medical practice. What is more, the Court of Appeals here stated that the Courts are "without jurisdiction" to interfere with the type or amount of punishment visited by the Appellee upon a New York physician, even though the Appellee may have "ignored weighty considerations and acted on matters not proper for consideration." Exhibit A, page 57. The Appellee is therefore utterly immune by statute and by judicial declaration. Judge Fuld stated: "However, there is no more reason here, than with

other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds,<sup>4</sup> so broad, so unrestrained, then I venture, the statute transcends constitutional limits." As the dissenting opinion concluded, such unlimited power and unfettered discretion "as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the legislature" and is "not merely delegation run riot but legislative abdication", and "violates first principles." Exhibit A, pages 67-8. These statements are particularly apposite in view of the report of Appellee's own Committee on Discipline that "we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand" (fol. 192). If Appellee's power is so unfettered that it can disregard the record here, and disregard its own Committee's report, and if such arbitrary and capricious power "unsupportable on rational grounds" cannot even be reviewed judicially, then truly what is involved is "legislative abdication" that "violates first principles."

(e) There is ambiguity and contradiction, without standards, as to the purpose of the "hearing" mentioned in sections 6514(2) and 6515(4). The Court of Appeals held here that the hearing is solely for the purpose of adducing testimony reflecting upon the punishment, because "Of course the statute itself was justification for taking the conviction as a professional fault, and the Regents receiving

<sup>4</sup> In the course of its opinion, the court has written (Opinion, p. 6):

"As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to review such questions. (Emphasis supplied.)"

voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties," but this testimony "could not change the admitted fact of their conviction." Exhibit A, pages 57, 54. But section 6515(4) states that the charges must be determined "upon their merits" and the physicians can be "found guilty" or "not guilty". Appellant had adduced voluminous uncontradicted testimony to show that although he had been found guilty in the criminal trial which had been limited to constitutional issues, he was not actually guilty. Appellee's Committee on Discipline concluded "Our examination of the record discloses no such basis" "for concluding that these views and assertions were not honestly held and made" and they "sufficiently explain the refusal \* \* \* to produce the \* \* \* records, that being the only method by which the legal objections \* \* \* could be judicially determined and the traditional method \* \* \*." (fol. 179)

The holding of the Court of Appeals here, is in direct conflict with the wording of the statute and also with its holding in *Matter of Donegan*, 265 App. Div. 774, affd. 294 N. Y. 704, where the Court, mindful of the holding in *Matter of Donegan*, 282 N. Y. 285, that the foreign conviction is only a "prima facie finding of guilt," sanctioned the use of the hearing to establish innocence despite a prior conviction. In that case an attorney had been convicted of a mail fraud in the Federal Court in New York by a Court and jury. The conviction was affirmed by the Court of Appeals for the Second Circuit. Nevertheless, when he was brought up in disbarment proceedings, it was held that the Board had a right to re-examine the question of innocence or guilt. Thereafter he was found to have been innocent despite the fact that the Federal Court and jury

had found him guilty, and the recommendation that he not be disbarred was upheld by the Court. The Court of Appeals at bar has plainly adopted a conflicting and discriminatory procedure. Appellee is therefore apparently to have unlimited power and discretion to declare that on some occasions hearings will be limited to establishing the conviction and that the taking of testimony will merely be for purpose of fixing the punishment. On other occasions, the hearing will be used as an independent search into the original guilt or innocence.

Such "hearings" at the discretion of the Appellee, sanctioned by the Court of Appeals, are no real hearings. They guarantee the physician just one thing: that the Regents will use their discretion as they see fit, and no Court will interfere. Further, section 6514 is not limited to discipline predicated upon convictions of crimes. Aside from subdivision 2b, all the other subdivisions refer to matters that must necessarily be examined in a real hearing; and they cannot be established as readily as a prior conviction. Therefore, the hearings provided for in section 6515, which section is not limited only to hearings involving sub-division 2b of section 6514, must of plain necessity, involve hearings on all the facts and merits. There is nothing in section 6515 that can possibly serve as the basis for a restricted hearing, restricted in the manner the Court of Appeals here sanctions, when sub-division 2b of section 6514 is involved. To delimit the hearing, to disregard the evidence adduced on that hearing bearing on original guilt or innocence, is to deprive Appellant of a real hearing. That the Court of Appeals intended to treat the role of the Regents here as that of a "sentencing judge", is confirmed by that Court's citation of *Williams v. New York*, 337 U. S. 241, 246 *et seq.* A hearing before a "sentencing judge" on an application to revoke a medical license, is no hearing at all. To sanction a total disregard of the evidence as far as original guilt or

innocence is concerned, to suspend appellant's license despite the detailed report of the Appellee's own Committee on Discipline and the evidence, is to deprive Appellant of a judicial hearing and of his liberty and property without due process. *Ng Fung Ho v. White*, 259 U. S. 276, 284.

(d) The Court of Appeals refused to interfere even though the Appellee on the hearing, "ignored weighty considerations, and acted on matters not proper for consideration." Exhibit A, page 57. Section 6515 (5) requires that a determination be based upon "legal evidence". In the hearing before the Sub-Committee of the Appellee's Medical Grievance Board, the Attorney-General of New York, over objection, repeatedly adverted to the fact, in page after page of testimony, that the Organization had been placed on the United States Attorney General's subversives list. (It had not been on the list even at the time of Appellant's indictment.) The Attorney General of New York also adduced testimony that the complaint of the organization against the United States Attorney General in connection with that listing had been dismissed by the District Court and the dismissal had been affirmed by the Circuit Court of Appeals. The Sub-Committee of the Medical Grievance Committee and the entire Medical Grievance Committee, predicated their decision to suspend Appellant's license, if not completely at least in part, upon that listing (fol. 98). But subsequent to the hearing, the Supreme Court of the United States reversed. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. Plainly the reference to the listing was as Judge Fuld noted, "gross and prejudicial error." Exhibit A page 67. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. *United States v. Remington*, 191 F. 2d 246, 252. Despite that reversal by the United States Supreme Court, the Appellee simply disregarded the report and recommendation of its own Committee on Discipline, disregarded the

reversal, and upheld the recommendation of the Medical Grievance Committee in imposing this six months' suspension. Plainly the suspension was not based on "legal evidence." Despite this undisputed, patent, gross and prejudicial error, the Court of Appeals held that it had no jurisdiction to interfere. Although a number of similar illustrations were complained of in the Court of Appeals, this one alone should suffice to illustrate the type of "hearing" and the type of "evidence" involved.

It is only realism to recognize that this listing and the dismissal of the Organization's complaint in the courts below the United States Supreme Court, undoubtedly furnished the *raison d'être* of this entire proceeding against the Appellant. Had it been another organization, it is fair to assume that nothing would have happened. In any event, a hearing at which "evidence" of the listing and the affirmance of the dismissal of the organization's complaint may be adduced and used in the findings, but in which the Appellee may disregard the reversal in the Supreme Court, is a hearing not supported by legal evidence, a hearing involving an application of an erroneous and reversed principle of law, and not a fair hearing. The refusal of the Court of Appeals to intervene despite the fact that this error is not even disputed, deprived Appellant of the guarantee of due process of law. *Ng Fung Ho v. White*, 259 U. S. 276, 284.

As Judge Fuld stated here: "However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitu-

tional limits." \* \* \* "Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small v. Moss*, 279 N. Y. 288, 299, we declared that 'The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,' and in *Packer Collegiate Inst. v. University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we stated that 'there must be a clearly delimited field of action and, also standards for action therein.' (See also, *Niemotko v. Maryland*, 340 U. S. 268, 273; *Matter of Fink v. Cole*, 302 N. Y. 216, 225). The wisdom of that constitutional safeguard is highlighted by its disregard in this case." Exhibit A p. 67, 68. *Field v. Clark*, 143 U. S. 649, 692. *U. S. v. Grimaud*, 220 U. S. 506, 520. *Panama v. Ryan*, 293 U. S. 388, 415. *Schechter v. U. S.*, 295 U. S. 495, 537.

IV. The statutes as construed and applied, are discriminatory, arbitrary and oppressive class legislation, violative of the constitutional provision for equal protection and constitute bills of attainder.

Heretofore physicians convicted of federal felonies that are not felonies in New York, received the benefit of the legislative definition limiting the felonies to those defined as such by the New York Law. They also received the benefit of the traditional policy of New York not to add additional domestic punishment for conviction of foreign offenses. The Court of Appeals now, however, rules that the word "crime" (which is held to include felonies as well as misdemeanors) in subdivision 2b of the same statute, when applied to a New York physician convicted of what is deemed a federal misdemeanor, will receive a different in-

terpretation and the physician will not receive the benefit of the mentioned policy. Section 6514 (2b) with its meaning so fixed, thus becomes discriminatory, oppressive class legislation, arbitrarily and unjustly discriminating against physicians convicted of the lesser offense. It deprives Appellant of the guarantee of equal protection. There is no basis in justice, reason, or in relationship to medical practice, for such discrimination, and no real and substantial relation of any such discrimination to the public health, safety, morals or any other phase of the general welfare. As the dissent pointed out, "the argument is far stronger for limiting the term 'crime' than for limiting the term 'felony' ". Exhibit A page 64.

Further, to permit attorneys to have the benefits of the procedure mentioned in *Matter of Donegan* 265 App. Div. 774, aff'd 294, N. Y. 704; also 282 N. Y. 285; where the New York supervisory body for attorneys was authorized to investigate the question of foreign conviction and actually find the attorney innocent despite a federal court and jury verdict of guilty and an affirmance thereof, and to deny that procedure to physicians, is again indicative of the discriminatory nature of this legislation, with its meaning so fixed, and again indicative of the lack of equal protection.

To grant physicians full hearings in connection with all other sub-divisions of section 6514, but not in connection with sub-division 2b; to hold that the foreign conviction automatically establishes the "professional fault", so that the evidence "could not change the admitted fact of their conviction" Exhibit A pages 54, 57; to hold that a reversal by the United States Supreme Court of a holding in connection with a material matter, may be disregarded, all point up the discriminatory, oppressive nature of this class legislation and the denial of the equal protection principle. "Though the law itself be fair on its face and impartial in

appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U. S. 356, 373-4 "Class legislation discriminating against some and favoring others, is prohibited \* \* \*." *Barbier v. Connolly*, 113 U. S. 27, 32. "But doubtless, unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge". Mr. Justice Frankfurter in *Garner v. Los Angeles Board* 341 U. S. 716, 725.

Particularly because of the listing of the organization, the reference thereto in the hearing before the Appellee, the temper of the times, the reference to the affirmance of the dismissal of the organization's complaint against that listing, the disregard of the later reversal by the Supreme Court, and the utter lack of even an attempt to controvert Appellant's testimony, the Appellant must conclude that Appellee has employed the statutes involved as a bill of attainder. "The Constitution deals with substance not shadows." *Cummings v. Missouri* 4 Wall. 277, 325. There is reason to believe the statutes were used "to impose pains and penalties for past lawful associations \* \* \*." *Wieman v. Updegraff*, 344 U. S. 183, decided by the Supreme Court December 15, 1952. Because the foreign conviction was itself deemed "a professional fault", the statutes were used "to inflict punishment without a judicial trial \* \* \*," *Cummings v. Missouri* 4 Wall. 277, 323. *Garner v. Los Angeles* 341 U. S. 716, 722. The Appellee "determines the sufficiency of the proof adduced whether conformable to the evidence or not; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense". *Cummings v. Missouri* 4 Wall. 277, 323. The

"power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution". *Ex Parte Garland*, 4 Wall. 333, 379.

V. The statutes as construed violate the precept that a state may not impose penalties for acts or omissions occurring beyond its jurisdiction in territory like Washington, D. C., where the United States has exclusive jurisdiction. The contempt and conviction at bar both occurred in Washington, D. C., where the United States has exclusive power of legislation and exclusive jurisdiction. The statutes here which imposed penalties for conduct in Washington, D. C., are invalid because "a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States," and because "the State undertakes to go beyond its jurisdiction into territory where the United States has exclusive control." *Western Union v. Brown*, 234 U. S. 542. "It is of the highest public importance that the jurisdiction of the State should be resisted at the borders of those places where the power of exclusive legislation is vested in Congress by the Constitution. \* \* \* If it is desirable that penalties should be inflicted for a default \* \* \* accruing within the jurisdiction of the United States, Congress only has the power to establish them." *Western Union v. Chiles*, 214 U. S. 274.

This principle becomes doubly important here where the default in the production of the books was deemed an offense only in Washington, D. C. and not in New York, and where there was no relationship between the act and the regulation of medical practice in the interests of the public of New York State.

VI. The statutes as applied, disregard Title 18, U.S.C. section 402, a law of the United States, and thus violate Article VI of the Constitution.

The indictment against Appellant was for "Contempt of the House of Representatives Committee" (S.M. p. 126). The Attorney General of New York said the conviction was for "contempt of Congress" (S.M. p. 459). The word "crime" is not mentioned in the indictment or judgment of conviction (S.M. p. 130). Title 18 U. S. C., defines "crimes" against the United States. Section 402 thereof is headed: "Contempts constituting Crimes." The contempt of which Appellant was found guilty is not mentioned there at all. At the bottom of that section the following appears: "all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." Thus, the contempt at bar is not designated even as a federal "crime". Although it is a contempt that may be "punished" according to the "prevailing usages at law", it is not listed as a federal crime and therefore the requirement of section 6514 (2b) that there be a "conviction of a crime", is missing. Appellee failed to discharge the burden of proving there was a crime by failing to resolve the doubt, to say the least, that section 402 of Title 18 throws upon the existence of a "crime" at bar. To disregard Title 18 U. S. C. section 402 is to disregard a law of the United States.

Title 2 U. S. C. section 192 under which Appellant was convicted, states that such a contempt "shall be deemed" a misdemeanor but since said contempt was excluded from the section on "Contempts constituting Crimes", and since such a contempt is merely "deemed" a misdemeanor for purposes of "punishment" (Title 18 U. S. C. sec. 402), the word "deemed" must be accorded its natural meaning in its proper context as a "deeming" merely for purposes of "punishment". "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is to be deemed to be. It is

rather an admission that it is not what it is to be deemed to be and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed that thing." *The Queen v. County Council of Norfolk*, 60 L. J. Q. B. (N. S.) 379, 381-2.

Although this contempt is treated for purposes of punishment as though it were a misdemeanor, it is not a "crime" because it nowhere appears in Title 18, U. S. C. section 402 or in the indictment, as a "crime". It is one thing to make a contempt a crime as in Title 18 section 402. Such contempts become "crimes". It is a different thing to treat an act, for the purposes of punishment, with the same effect as though it were a crime. Things equal in effect, are not identical. Both a heart attack and a bullet can kill; they have that effect; nevertheless they are not the same. Although the effect is the same the failure to designate this contempt as a federal crime means that it is not a crime especially in proceedings such as these where statutes "must be strictly construed" in favor of the Appellant because they are "penal" in nature. (*Matter of Donegan* 282 N. Y. 285). In addition, there is the distinction between a "crime" and a "misdemeanor" adverted to before.

VII. The statutes as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and thus violate, Article I Section 7 of the Constitution.

There is no crime under the laws of the United States unless that crime is defined by an "Act" or a "Statute" of Congress. "One may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an Act of Congress." *Donnelly v. U.S.* 276 U.S. 505, 511. "We agree that the courts \*\*\* in determining what constitutes an offense against the United States, must resort to the statutes of the United States enacted in pursuance of the Constitu-

tion.'' *Re Kollock* 165 U.S. 526, 533. *U.S. v. Eaton* 144 U.S. 677, 687-8.

The Constitution treats an "Act" of Congress as different from a "Joint Resolution." An "Act" reads: "Be it 'enacted' by the Senate and House" (Title 1 U.S.C. secs. 21, 101). A "Joint Resolution" reads: "Be it resolved by the Senate and House" (Title 1 U.S.C. secs. 22, 102). There are basic, historical and legal differences resulting in a differentiation that is plainly crystallized in the Constitution (Art. 1, sec. 7 clauses 2 and 3; Art. III; Art. VI). "Law Making in the U. S." by Dr. Harvey Walker—1934 ed. p. 317. Only "Laws" that are "enacted" as such are made part of the law of the land. Art. 1, sec. 7; Art. VI. Joint Resolutions, even though they go through the same preliminary processes, merely "take effect"; Art. 1, sec. 7; they are not included as part of the law of the land. They are used for miscellaneous matters such as extending an invitation to Lafayette to visit the United States (Dec. 6, 1824; 18th Congress, 2nd session House Journal p. 8), or to welcome Kosuth (Dec. 15, 1851; 32nd Cong. 1st sess.; House Journal p. 89), or to give notice of the abrogation of a treaty (Apr. 20, 1846, 29th Cong.; House Journal p. 695, 697).

The offense of which Appellant was convicted, embodied in Title 2, U.S.C. sec. 192, is not mentioned in an "Act" of Congress, but a "Joint Resolution". 52 Statutes 942. The offense of which Appellant was convicted is therefore not a crime under the "laws" of the United States. The resolution merely "took effect". "A Joint resolution \* \* \* has the effect of law." *Watts v. U. S.*, 161 F. 2d 511; c. d. 68 S.Ct. 81. Thus, a "contempt constituting a crime" (Title 18 U.S.C. sec. 402), and this contempt are equal in effect only. Again, things equal in effect only are not identical. Appellant was convicted not of a federal crime but of what was "deemed for purposes of punishment" and

treated in "effect" as though it were an offense. When this Joint Resolution was passed, there was asked from the floor of Congress: "is it within the power and jurisdiction of the House to amend the statutory law of the United States in the form of a joint resolution and not in the form of a bill?" The answer in part was: "Strictly speaking, proposed laws should be introduced and all changes in law made through the introduction of bills. Personally I would like to see this joint resolution feature abandoned, except where it involves something which is not really fundamental law." Congressional Record Vol. 83, p. 8171, Part 7, 75th Cong.; 3rd Session.

Appellee claimed the foregoing contention was "unpersuasive". But the burden of being persuasive rested upon Appellee who has never attempted to explain away Title 18 U.S.C. Sec. 402 or the constitutional differentiation between a Law and a Joint Resolution. Since the burden rested upon the Appellee to prove that the Appellant has been convicted of a crime and since crimes can only be created by Acts of Congress and not Joint Resolutions and since the statutes "must be strictly construed", the Appellee failed to discharge the burden resting upon it. To disregard the differentiation mentioned in the Constitution between a Law and a Joint Resolution is to disregard Article 1 Sec. 7.

VIII. The questions are of importance to the public and to all professions and pursuits. As Judge Fuld stated here: "the present decision has an importance that transcends and reaches far beyond this case. And that — its impact over the years — is what so deeply troubles and concerns me." (Exhibit A page 65). The constitutionality of the statutes involved has never been passed upon before. Further, this is the first time it has been held that a medical license may be suspended or revoked by reason of the conviction for an offense that is not violative of New York law,

that involves neither moral turpitude nor intellectual unfitness, and that is not related to the medical practice. The ramifications and repercussions of such a decision on all callings, need no lengthy discussion. The Court of Appeals agreed here that the statutes are "stringent". Exhibit A page 57. The matter affects every physician in New York State. In the Appellate Division and Court of Appeals some 1700 physicians from all over New York State signed a brief amicus on behalf of the Appellant. The American Civil Liberties Union did likewise in a separate brief urging unconstitutionality. The Attorney General of New York himself alluded to "the importance of the rights invoked by the Petitioners" in a brief in the Court of Appeals.

A decision here will help settle not only serious constitutional questions, but may well prevent recurring questions of constitutionality in connection with medical licenses and in other pursuits. A decision here may well remove any doubt in connection with the issue of whether the legislature may undertake "to deprive a man of his practice or trade for reasons unconnected with its proper exercise," as the dissent phrased it. A decision here may also settle the plainly unreasonable conflict among the holdings in the Court of Appeals that the license of New York physicians who are convicted of foreign felonies that are not crimes in New York are not subject to revocation under one subdivision of the statute, but that physicians convicted of foreign "crimes" including the lesser offenses of misdemeanors that are similarly not crimes in New York, may nevertheless have their licenses revoked under another subdivision.

Further, since Appellant's conviction resulted from testing the validity of acts of a House Committee, a determination here may help decide whether in addition to paying a jail penalty for that test, physicians and others may be

**deterred from such tests by being deprived of their means of livelihood.**

**A decision here will help clarify the purpose of the hearing mentioned in Section 6515 and determine whether the role of the Regents is as sentencing judge for additional punishment, or as a tribunal conducting a hearing on the merits.**

**There is also involved a constitutional question of considerable public importance relating to the ability of a State to impose domestic penalties for offenses committed in places where the United States has exclusive jurisdiction. In addition, a decision here may determine whether offenses under Title 2 U.S.C. sec. 192 are federal "crimes" in view of Title 18, U.S.C. sec. 402. Finally, such a decision may clarify the legal consequences of the constitutional differentiation between a Law and a Joint Resolution.**

**These are all matters of far-reaching importance that require this Court's intervention.**

**Wherefore it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and the appeal in the above entitled cause comes within the proper jurisdiction of this Court.**

**ABRAHAM FISHBEIN,**  
*Counsel for Appellant.*

**EXHIBIT "A"****COURT OF APPEALS**

In the Matter of the Application of DR. EDWARD K. BARSKY,  
*Petitioner-Appellant*; for a Review under Article 78 of the  
Civil Practice Act, of the Determination of THE BOARD OF  
REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,  
Suspending Petitioner's Medical License and Permission  
to Practice Medicine in the State of New York for Six  
Months, *Respondent-Respondent*

In the Matter of the Application of JACOB AUSLANDER,  
*Petitioner*,

*against*

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF  
NEW YORK, *Respondent*; Reviewing and Annulling the  
Determination of Respondent in Suspending the Peti-  
tioner's License to Practice Medicine in This State, as a  
Physician for three months (Also, Matter of LOUIS MIL-  
LER v. SAME)

DESMOND, J.:

These are proceedings, brought, under Article 78, C. P. A.,  
to review determinations of respondent Board of Regents,  
suspending for certain periods the medical licenses of peti-  
tioners Barsky and Auslander, and censuring and reprimanding  
petitioner Miller. In each instance the Board  
found authority for its action in Section 6514, subd. 2b of  
the Education Law, which authorizes disciplinary action  
against a physician who "has been convicted in a court  
of competent jurisdiction, either within or without this  
state, of a crime". The question on this appeal is as to  
the meaning and application of that statute.

Each of the petitioners-appellants is a physician licensed  
to practice in this state. All three were members of the  
executive board of The Joint Anti-Fascist Refugee Com-  
mittee, a voluntary association which functioned during the  
Second World War and immediately thereafter (see the  
brief statement of its history and aims, in *Anti-Fascist*

*Committee v. McGrath*, 341 U. S. 123, at pp. 130, 131). All three were indicted in the United States District Court for the District of Columbia for, and all were, after a jury trial in that court, convicted of, the misdemeanor of contempt of Congress, under Title 2, Section 192, of the United States Code, in that each of them failed to obey a subpoena requiring him to produce before a Congressional Committee, the financial books and records of The Joint Anti-Fascist Refugee Committee. Each was sentenced to a fine and to imprisonment. The judgments of conviction were affirmed on appeal (*Barsky, et al. v. United States*, 167 Fed. 2d 241), certiorari was twice denied by the Supreme Court (334 U. S. 843; 339 U. S. 971), and each petitioner paid his fine and was imprisoned. Then followed the charges with which we deal here.

We consider that, in these records on appeal, there are no controlling facts other than those above summarized, since the voluminous testimony before the Regents as to the character and purposes of the Joint Anti-Fascist Refugee Committee, and as to the motives of these appellants, could not change the admitted fact of their conviction. From the record it is clear that each petitioner has, in fact, "been convicted in a court of competent jurisdiction \* \* \* without this state, of a crime" (Education Law, Sec. 6514, subd. 2b). Petitioners, however, make these arguments: first, that the statutory language applied only to such offenses as are crimes under New York law, and that contempt of Congress (Section 192, Title 2, U. S. C.) is not a crime under any statute of this state; second, that the legislative intent of Section 6514, subd. 2b, is to authorize disciplinary action for such offenses only as involve moral turpitude, or are related to professional ability or conduct, and, third, that the Regents imposed unwarranted punishment, and took into account prejudicial matter in fixing the penalties.

There is nothing in Section 6514, subd. 2b, which says that, in order to serve as a predicate for action thereunder, the "crime" must be one specifically forbidden as such by a New York penal statute. Indeed, a directly opposite idea is expressed in the language: "convicted in a court of competent jurisdiction, either within or without this

state, \* \* \*". Such language is too plain to permit construction by addition of unexpressed qualifications or exceptions (*Matter of Rathscheck*, 300 N. Y. 346, 350). Petitioners, however, argue that such decisions as *Matter of Donegan*, 282 N. Y. 285; *People ex rel. Marks v. Brophy*, 293 N. Y. 469; *Matter of Tonis v. Board of Regents*, 295 N. Y. 286, and *Matter of Garson v. Wallin*, 304 N. Y. 702, mean that the New York courts construe such statutes as Section 6514, subd. 2b, as authorizing penalties for such offenses only as are made criminal, if committed in this state, by our own laws. As to the Donegan, Marks, Tonis and Garson cases, each had to do with the imposition of stringent additional penalties, on, and solely because of, conviction of a "felony". Donegan, Marks, Tonis and Garson had each fallen afoul of a foreign statute which made certain conduct a felony which was either a misdemeanor in New York, or not cognizable at all under our domestic statutory definitions and classifications of crimes. Indeed, this court, as to Donegan (see p. 293 of 282 N. Y.) made it clear that it was not denying the Appellate Division's *discretionary* power to deal with him as one guilty of a "crime" (former Section 88, subd. 2, now Section 90, subd. 2, Judiciary Law). In the statute now before us (Education Law, Sec. 6514, subd. 2b) the Legislature has authorized disciplinary action against one convicted, not of a "felony", but of a "crime". Traditionally as well as by express statute (Penal Law, Sec. 2), the word "crime" in New York Law includes misdemeanors as well as felonies, and so it is patent that these petitioners have "been convicted, in a court of competent jurisdiction, \* \* \* without this state, of a crime". As we remarked in *People ex rel. Marks v. Brophy, supra*, 293 N. Y. at pp. 474-5, it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction. But public policy is made by the Legislature (see *Matter of Rhinelander*, 290 N. Y. 31, 36) and the policy of this section of the Education Law cannot be misunderstood. It does not require the imposition of any particular penalties, but leaves it to the Regents to decide on the measure of discipline, up to the extreme limit of license revocation.

We do not find it necessary to rely on an additional ground, put forward in the report of the Regents' Committee on Discipline in these proceedings for holding that petitioner's conviction in the District of Columbia was for a "crime", as that word is used in the Education Law section. The Committee on Discipline noted that New York does have, in Section 1330, Penal Law, a provision making it a misdemeanor, wilfully to refuse to produce material and proper documents before a committee of our *State Legislature*. That enactment, the Regents' Committee thought, is so similar in meaning to Section 192, Title 2, United States Code, that one violating the latter is really committing about the same offense as is made criminal by our Section 1330. Be that as it may, we construe Section 6514, subd. 2b of the Education Law as it plainly reads, that is, to authorize discipline by the Regents in the event of a conviction of a physician of a crime in any court of competent jurisdiction. Section 1330, *supra*, does, however, have this significance at this point: it illustrates, at least, that making a criminal offense out of a refusal to obey a legislative subpoena is in line with New York public policy, as well as that of the Federal government.

Appellants suggest that a literal construction of Section 6514, subd. 2b, will empower the Board of Regents to destroy a person, professionally, solely on a showing of the commission by him in some other state (or country) of an act which we in New York consider non-criminal, or even meritorious. Two answers are available to that: first, some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases; and, second, the offense here committed, contempt of Congress, is no mere trivial transgression of an arbitrary statute.

Turning to appellants' second main argument, we consider it impossible to read into Section 6514, subd. 2b, *supra*, a condition or qualification that, to justify professional discipline, the crime must be one involving moral turpitude (see, as to there being no moral turpitude in this offense, *Sinclair v. U. S.*, 279 U. S. 263, 299), or one related to the profession itself. The Legislature knows how to state such

limitations when it so desires (see, for instance, present Education Law, Section 7406, subd. 1, as to certified public accountants, and, as to physicians, compare former Public Health Law, Section 161, with present Education Law, Section 6502). Nor is this an attempt to "enforce the criminal laws of the United States" (*People v. Welch*, 141 N.Y. 266, 275). We are enforcing our own statute, of not uncertain meaning, which simply empowers the Regents to impose a penalty upon any physician who has been convicted of a crime in any competent court anywhere. Stringent as it is, that statute needs no cutting down, for constitutionality's sake. It is no argument against the validity of this statute that it considers a criminal conviction anywhere as a showing of unfitness, for "it is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character" (*Hawker v. New York*, 170 U.S. 189, 196). A professional license is a privilege from the state, and the state can attach to its possession conditions onerous and exacting. The special equities of individual cases can be reflected in variety of punishment, as was done here, but the choice among such varieties is for the Board, not the courts (*Matter of Sagos v. O'Connell*, 301 N.Y. 212).

Somewhat similar to the argument, *supra*, that moral turpitude must be shown, is the contention that the Regents acted arbitrarily in acting on the Federal conviction alone, without regard to the moral right or wrong of what petitioners actually did, that is, refuse to obey legislative subpoenas, and without regard to their motives. Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties.

As to the assertions, by appellants, that the Regents dealt too severely with them, or that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such

questions (*People ex rel. Masterson v. French et al.*, 110 N. Y. 494, 500; *People ex rel McAleer v. French, et al.*, 119 N. Y. 502, 507; *People ex rel Greenbaum v. Bingham*, 201 N. Y. 343, 347; *People ex rel. Morrissey v. Waldo*, 212 N. Y. 174, 179; *People ex rel. Regan v. Enright*, 240 N. Y. 194, 198, 199; *Matter of Sagos v. O'Connell*, 301 N. Y. 212, 215; Benjamin, Report to the Governor on Administrative Adjudication, Vol. 1, pp. 170, 217; see *Jaffe v. State Board*, 135 Conn. 339, 352, 353, 354; *Williams v. New York*, 337 U. S. 241, 246 et seq.). *Matter of Tompkins v. Board of Regents*, 299, N. Y. 469, does not announce or apply any different rule as to court review of administrative discretion in measuring out discipline against physicians. In the Tompkins case, we reversed an Appellate Division order annulling a Regents' determination because the Appellate Division had exceeded its powers in so doing. Sending the whole matter back to the Regents, because of that error of law, we reminded the Board of the physician's fine record, etc., and suggested that such factors should be significant to the Board in again "exercising its broad discretion to frame the appropriate discipline, for the offense and for the offender". In that same connection, however, in Tompkins, we made it entirely clear that "the exercise of that discretion is beyond our power to review." Had we not there found an error of law (not as to punishment but as to the Appellate Division's unwarranted annulment order) we could not, in the Tompkins case, have done other than affirm. In the present case there is no error of law, and so no basis for any interference by us.

The orders should be affirmed.

#### OPINION TO REVERSE

FULD, J. (dissenting):

It is "the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction." (*People ex rel. Marks v. Brophy*, 293 N. Y. 469, 474.) That public policy is grounded in a natural and humane abhor-

rence of heaping added domestic penalties upon one convicted of a crime in a foreign jurisdiction. I cannot, therefore, agree with the court's conclusion that the license of a physician may be suspended or revoked by the Regents—pursuant to section 6514, subdivision 2(b), of the Education Law—because of a conviction of a crime "without the state," when the underlying act is not of a character recognized as criminal by the laws of this state, when it has been held by the courts of the convicting jurisdiction not to involve moral turpitude and when there is no evidence reflecting adversely on the licensee's qualifications to practice his profession.

Appellant Barsky and a number of others, all members of the Executive Board of the Joint Anti-Fascist Refugee Committee, were convicted under title 2, section 192, of the United States Code, of the misdemeanor of contempt of Congress, for failing to produce records of the organization, pursuant to a subpoena of a Congressional Committee conducting an investigation. The conviction was affirmed—one judge dissenting—by the United States Court of Appeals for the District of Columbia (*Barsky v. United States*, 167 F (2d) 241); a petition for a writ of certiorari was denied by the United States Supreme Court in June, 1948 (334 U.S. 843) and a petition for rehearing was denied two years later, with a notation that two of the justices were of the opinion that the petition should be granted (339 U.S. 971). Barsky served a term of five months in prison.

The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6514, subd. 4; Sec. 6517). It summarized "the issues litigated and not litigated at the criminal trial" in this way: "There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient."

The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment.

With regard to the reasons given by Barsky and the other members of the Refugee Committee for withholding records called for by the subpoena, the Regents' Committee on Discipline wrote as follows:

"They had been advised by counsel that the subpoenas were invalid. \* \* \* They asserted that \* \* \* (none) of their activities fell within the scope of the matters into which \* \* \* the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad', and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or who were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945 (before the subpoenas were issued), asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined in the courts.

"If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (*Sinclair v. United States, supra* (279 U. S. 263)). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis."

And, commenting on the crime of which appellant was later convicted, the Regents' Committee found that "no moral turpitude" was involved. (See *Sinclair v. United States*, 279 U. S. 263, 299.)

Those findings are not here questioned; actually, they rest, in large part, on concessions of the Attorney General at the hearing before the Medical Grievance Committee.<sup>1</sup> Thus, he conceded that appellant was advised by counsel that "the subpoenas were unconstitutionally issued and that he was not legally required to respond to them"; that that opinion at that time was not "an unreasonable construction of law"; and that the same opinion "was held by many lawyers and some jurists"—indeed, by one of the federal Court of Appeals judges who heard the criminal appeal. In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair v. United States, supra*, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients.

<sup>1</sup> It should be noted that, when the parties were before the Regents' Committee on Discipline, counsel stipulated that that Committee should consider and take into account matter not in the record of the hearing before the Medical Grievance Committee, including specifically the record of the criminal case in the federal court.

Upon such facts, it should require exceedingly plain language to cause a court to conclude that the legislature has authorized appellant's suspension from practice for six months or, indeed, as the court implies, the revocation of his license.

The court chooses to find such language in that portion of the section of the Education Law which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without the state, of a crime." It is urged that this language "is too plain to permit construction by addition of unexpressed qualifications or exceptions" (Opinion, p. 2). In that I cannot concur. Experience has taught that sheer literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e. g., *People ex rel. Marks v. Brophy*, *supra*, 293 N. Y. 469; *Matter of Donegan*, 282 N. Y. 285; see, also *Matter of Garsson v. Wallin*, 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra*, 282 N. Y. 285, 292), we said that discipline "partakes of the nature of punishment," with the consequence that statutes imposing discipline "must be strictly construed," and, in the *Marks* case (*supra*, 293 N. Y. 469, 474), we declared, to "decree forfeitures \* \* \* because of violations of the criminal laws of another jurisdiction," is contrary to the established "public policy of this State".

For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to. There is nothing new in the words "convicted \* \* \* without this state"; the *Marks* case (*supra*, 293 N. Y. 269) dealt with virtually identical language and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agree-

ment—conviction of “a felony, either in New York State or any other state”—declared (293 N. Y., at p. 474):

The Atkins case (248 N. Y. 46, *supra*), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of ‘any felony,’ the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this realtor should suffer a similar forfeiture if convicted of ‘a felony, either in New York State or any other state’ meant the same thing.”

Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to warrant the imposition of an additional penalty in this state. It must be a particular kind of conviction.

“Felony,” as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N. Y. 285) or the governor (*People ex rel. Marks v. Brophy, supra*, 293 N. Y. 469) used the word “felony”, they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N. Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (Sec. 88, subds. 3, 4; sec. 477; now numbered sec. 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old sec. 88, subd. 4; present sec. 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and reasonably be presumed that our legislature, when it required disbarment for conviction of a federal “felony,” considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for viola-

tions of the laws of another jurisdiction and in view of the requirement that the statute be strictly construed.

So, here, where the legislature has declared that it must be a conviction of a "crime," the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving "felony" and the one before us involving "crime"—the argument is far stronger for limiting the term "crime" than it is for limiting the term "felony." In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad "crimes" in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's "without the state," if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—"in some other state (or country) • • • which we in New York consider non-criminal, or even meritorious."<sup>2</sup>

It seems almost incredible to me that the legislature could have contemplated that such "non-criminal" or "meritorious" acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is

<sup>2</sup> The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (sec. 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) See. 55-103, Sec. 41-811, and see *Nations v. State*, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e. g., Ala. Code (1940) tit. 48, sec. 301 (31a); La. S.A.-C.C. (1950) Art. 45, Sec. 195; N.C. Gen. Stat. (1950) Sec. 62-121.71-72, and see *State v. Johnson*, 229 N.C. 701; S.C. Code (1952) Sec. 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) Sec. 56-329, and see *New v. Atlantic Greyhound Corp.*, 186 Va. 726). And, in Kansas, it is a crime to sell or even to drink aleoholic liquor in a public place. (Kansas Gen. Stat. (1949) ch. 41-719, 803, and see *State v. Shackle*, 29 Kans. 341.)

pointed out that such "a literal construction . . . will empower the Board of Regents to destroy a person" without the slightest warrant—that "some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases" (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst. v. University of State of N. Y.*, 298 N. Y. 184, 190, a "statute's validity must be judged not by what has been done under it but 'by what is possible under it.' " And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career.

As a matter of statutory construction alone, without considering whether such legislation may be constitutionally enacted, we should not attribute to the legislature a design so palpably harsh and extreme. (See *Matter of Rouss*, 221 N. Y. 81, 91, where the court declared, "Consequences cannot alter statutes, but may help to fix their meaning.") While affirmance herein may affect only appellant, the present decision has an importance that transcends and reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me. As I have sought to show, the only reasonable construction—and the one required by our precedents—is that only those acts, recognized by the laws of this state as criminal in nature, are encompassed by the statute before us.

In point of fact, the Regents' Committee on Discipline suggested that the charge against appellant might be sustained upon the ground that the federal crime of which he was convicted finds its analogue in section 1130 of our Penal Law—which provides that one who willfully refuses to produce documents before the state legislature or one of its committees, is guilty of a misdemeanor. The court has found it unnecessary—in the view that it has here taken—to consider that possibility, and, that being so, I see little to be gained by discussion of the matter.

However, at least one other question remains for decision.

After noting that the courts would ultimately have to decide whether appellant's crime was one contemplated by

the statute, the Regents' Committee turned to the subject of discipline and wrote that there was no basis in the facts presented for any punishment greater than censure and reprimand:

"While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline beyond the statutory minimum of censure and reprimand must, we believe, be based either on the inherent nature of the respondent's violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline."

And it ended its report in this way:

"Since violation of the Federal statute which \* \* \* (appellant) has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of \* \* \* (appellant's) explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommended that \* \* \* (appellant's) license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded."

The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances—made, it must be remarked, on a record less complete than the one before the Committee on Discipline.<sup>3</sup>

<sup>3</sup> While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that "Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-

This court has heretofore declined, in most instances, to consider the measure of discipline imposed by an administrative agency. (But cf. *Matter of Tompkins v. Board of Regents*, 299 N. Y. 469, 476-477.) That is a subject, we have concluded, that rests in the discretion of the agency. However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds,<sup>4</sup> so broad, so unrestrained, then, I venture, the statute transcends constitutional limits.

It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent or dishonest practitioners of medicine or of plumbing is, of course, for the legislature to decide. But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos v. United States District Court*, 19 F. (2d) 722.)

In sum, then, the court's construction of the Education Law provision, particularly when taken with its grant to

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General of the United States." Reliance upon that fact, was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123.)

<sup>4</sup> In the course of its opinion, the court has written (Opinion p. 6):

"As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to review such questions." (Emphasis supplied.)

the Board of Regents of uncontrolled discretion, not only as to the matters on which they may rely in reaching a determination but also as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the legislature. To me, it seems not merely delegation run riot but legislative abdication. A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to “the good sense and judgment” of the Regents, but, while “good sense and judgment” are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that “crime” has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss “of all that makes life worth living”. (*Ng Fung Ho v. White*, 259 U. S. 276, 284). Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small v. Moss*, 279 N. Y. 288, 299, we declared that “The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,” and in *Packer Collegiate Inst. v. University of State of N. Y.*, *supra*, 298, N. Y. 184, 189, after quoting that passage, we stated that “there must be a clearly delimited field of action and, also, standards for action therein.” (See, also, *Niemotko v. Maryland*, 340 U. S. 268, 273; *Matter of Fink v. Cole*, 302 N. Y. 216, 225.) The wisdom of that constitutional safeguard is highlighted by its disregard in this case.

For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary

fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall, (U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this Court, prevent any other conclusion.

I would reverse.

\* \* \* \* \*

Others affirmed, opinion by Desmond, J., in which all concur except Fuld, J., who dissents in an opinion.

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#### EXHIBIT "B"

In the Matter of EDWARD K. BARSKY, *Petitioner*, against  
BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF  
NEW YORK, *Respondent*

This is a review pursuant to article 78 of the Civil Practice Act suspending petitioner's license for a period of six months. Petitioner is a duly licensed physician. He was charged by the Committee on Grievances of the Department of Education of the State of New York with having been convicted of a crime in a court of competent jurisdiction within the meaning and purview of paragraph (b) of subdivision 2 of section 6514 of the Education Law, in that petitioner had been convicted in the United States District Court for the District of Columbia of a violation of section 192 of title 2 of the United States Code, commonly known as contempt of Congress. The questions presented on this review are the identical questions passed upon by this court in *Matter of Auslander* (279 App. Div. 447). On the authority of the former case, determination of the Board of Regents unanimously confirmed, without costs. Present—Foster, P. J., Heffernan, Brewster, Bergen and Coon, J.J.

**EXHIBIT "C"**

**In the Matter of LOUIS MILLER, Petitioner, against BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondent**

**In the Matter of JACOB AUSLANDER, Petitioner, against BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondent**

COON, J. The petitioners are doctors. They were convicted in the District Court of the United States for the District of Columbia for contempt of Congress for the refusal to produce certain records before a Congressional committee. That offense is a misdemeanor, therefore a crime (U. S. Code, tit. 2, § 192.) Their conviction was affirmed by the Court of Appeals for the District of Columbia (*Barsky v. United States*, 167 F. 2d 241), and certiorari was twice denied by the Supreme Court. (334 U. S. 843, petition for rehearing denied 339 U. S. 971.)

Subsequently the Board of Regents of the State of New York made a determination as to each petitioner in disciplinary proceedings, which this proceeding under article 78 of the Civil Practice Act, seeks to annul. The Board of Regents acted under paragraph (b) of subdivision 2 of section 6514 of the Education Law, which authorizes discretionary disciplinary action against a licensed doctor who "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Petitioners would interpret this language to mean that the "crime", wherever committed, must be one constituting a crime within the purview of the laws of the State of New York. They urge that there is no such crime as contempt of Congress in this State. Petitioners rely principally upon *Matter of Donegan* (282 N. Y. 285), and *People ex rel. Marks v. Brophy* (293 N. Y. 469). Both of these cases involved mandatory punitive action, not discretionary; and neither involved the statute which we are considering here.

When the Legislature used the words "within or without this state," it presumably meant what it said. There is no ambiguity in that language. Had the Legislature meant a

ime "without the state" which would constitute a crime within this State, it would have said so, as it has in other instances. (Education Law, § 6502.)

Petitioners also urge that the crime of which they were convicted bears no relation to the practice of medicine, and involves no moral turpitude. The conviction for any crime bears some relation to the practice of any profession, and moral turpitude depends upon a point of view and existing circumstances. Presumably, and by its language, the Legislature intended the Board of Regents to determine those questions and exercise its discretion.

The legal history of the trial, conviction and appeals conclusively establishes that petitioners were convicted by a "court of competent jurisdiction," and we think the Board of Regents acted within its lawful authority in making these determinations.

The determination in each case should be confirmed. FOSTER, P.J., HEFFERNAN, BREWSTER and BERGAN, J.J., concur. Determination in each case confirmed, without costs.

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#### **EXHIBIT "D"**

#### **NEW YORK STATE EDUCATION LAW**

Section 6514. Revocation of certificates; annulment of registrations.

1. Whenever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony, as defined in section sixty five hundred two of this article, the registration of the person so convicted may be annulled and his license revoked by the department. It shall be the duty of the clerk of the court wherein such conviction takes place to transmit a certificate of such conviction to the department. Upon reversal of such judgment by a court having jurisdiction, the department, upon receipt of a certified copy of such judgment or order of reversal, shall vacate its order of revocation or annulment.

2. The license or registration of a practitioner of medicine may be revoked, suspended or annulled or such practi-

tioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

- (a) That a physician is guilty of fraud or deceit in the practice of medicine or in his admission to the practice of medicine; or
- (b) That a physician has been convicted in a court of competent jurisdiction either within or without this state, of a crime; or
- (c) That a physician is an habitual drunkard, or is or has been addicted to the use of morphine, cocaine or other drugs having similar effect, or has become insane; or
- (d) That a physician offered, undertook or agreed to cure or treat disease by a secret method, procedure, treatment or medicine or that he can treat, operate and prescribe for any human condition by a method, means or procedure which he refuses to divulge upon demand to the committee on grievances; or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio, or magazines; or
- (e) That a physician did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion or to procure the performance of the same by another or to violate section eleven hundred and forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.
- (f) That a physician has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including x-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, x-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equip-

ment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment. Nothing contained in this chapter shall prohibit physicians from practicing medicine as partners nor in groups nor from pooling fees and monies received, either by the partnerships or groups or by the individual members thereof, for professional services furnished by any individual physician, member, or employee of such partnerships or groups, nor shall the physicians constituting the partnerships or groups be prohibited from sharing, dividing or apportioning the fees and monies received by them or by the partnership or group in accordance with a partnership or other agreement; provided that a certificate of doing business under an assumed name shall have been filed pursuant to section four hundred forty or four hundred forty-b of the penal law, and provided further that no such practice as partners or in groups or pooling of fees or monies received or sharing, division or apportionment of fees shall be permitted with respect to medical care and treatment under the workmen's compensation law except as expressly authorized by the workmen's compensation law. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2, at page 292).

#### Section 6515. Procedure in disciplinary proceedings.

1. The committee on grievances shall be continued. Such committee shall consist of ten members who shall be appointed by the regents. The term of office of each of such members of such committee shall be five years. The terms of office of two members shall expire each year. In the case of vacancy at any time by resignation, death or otherwise in the membership of the committee, such vacancy shall be filled for the unexpired term in the same manner as provided for in the original selection of such member.

2. Any duly incorporated state medical or osteopathic society having two hundred or more members may nominate candidates for members of such committee, not to exceed three nominations for each member of such committee to which such society shall be entitled hereunder. When the candidates are so nominated the regents shall appoint for the terms specified herein as they shall determine, such members of such committee, so that such committee shall consist of four members who have been duly nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and the regents upon their own nomination shall appoint three members of conspicuous professional standing. Each member of such committee shall be a duly licensed physician of this state.

3. The members of such committee shall serve without compensation and shall annually, within ten days after the first day of January of each year, organize by the election of a chairman and a secretary.

4. The members of such committee shall have jurisdiction to hear all charges against duly licensed physicians, osteopaths and physiotherapists of this state for violation of the provisions of section sixty-five hundred fourteen hereof, except subdivision one, and upon such hearing such committee shall determine such charges upon their merits, and the department may, after due notice and hearing, upon the receipt from such committee of the record, findings and determination of such committee wherein and whereby such practitioner has been found guilty, revoke and annul his license, annul his registration, suspend him from practice, or reprimand or otherwise discipline him. Proceedings against any practitioner under this section shall be begun by filing a written charge or charges against the accused. Such charges may be preferred by any person, corporation or public officer, and they shall be filed with the secretary of the committee on grievances and such secretary shall forward to the executive officer of the department a copy of such charges in all cases in which such committee or a subcommittee thereof shall deem a trial necessary. The chairman of such committee, when charges are preferred, may designate three or more of the members of such com-

mittee, including, whenever possible, at least one member who represents the same school of practice as the physician, osteopath or physiotherapist, against whom the charges are preferred to hear and report upon such charges to such committee. The time and place of the hearing of such charges shall be fixed by the secretary of the committee as soon as convenient and a copy of the charges, together with a notice of the time and place when they will be heard shall be served upon the accused or his counsel at least ten days before the date actually fixed for such hearing. Where personal service or service upon counsel after due diligence cannot be effected and such fact is certified on oath by any person duly authorized to make legal service, the secretary of the committee shall cause to be published for four times at least thirty days prior to the hearing, a notice of the hearing in a newspaper published in the county in which the physician, osteopath or physiotherapist was last known to practice, and a copy of such notice shall also be mailed to the accused at his last known address. All such notices of hearing of charges shall contain a plain and concise statement of the material facts without unnecessary repetition, but not the evidence by which the charges are to be proved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses and evidence upon his own behalf, to cross-examine such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the committee. Such sub-committee to whom such charges were referred shall make a written report of findings and recommendations and the same shall be forthwith transmitted to the secretary of the committee on grievances, with a transcript of the evidence. Said grievance committee may thereupon act upon such recommendation as it shall deem fit, or may take further testimony if the same shall seem desirable in the interest of justice. Thereupon the committee shall determine such charges upon their merits (the vote of each member of such committee to be recorded as part of the committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them, the committee shall transmit

to the department the record, findings and determination wherein and whereby such practitioner has been found guilty, and their recommendation, and the regents after due hearing shall in their discretion execute an order accepting or modifying such determination of the committee as hereinabove provided. If the practitioner is found not guilty, the committee shall order a dismissal of the charges, and the exoneration of the accused.

Nothing herein contained shall estop the department from initiating proceedings in any case.

5. Any licensed practitioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight of the civil practice act for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or enjoined except upon application to such appellate division, after notice to the attorney-general. The committee on grievances or any member thereof may issue subpoenas and administer oaths pursuant to section sixty-one of the public officers law in connection with any hearing or investigation under this article and it shall be the duty of such committee to issue subpoenas at the request of and upon behalf of the defense. The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain the same. The department shall furnish legal advice and assistance to the committee whenever such service is requested.

6. Any controversy between two or more physicians, osteopaths or physiotherapists, or between one or more physicians, osteopaths or physiotherapists and another person, which such parties to such controversy agree to submit to arbitration, may be submitted in writing to the committee on grievances, which may in its discretion, act as arbitrator in such controversy, and the decision of the committee upon such arbitration shall be final, and where the same orders the payment of a sum of money, the same may be

docketed as a judgment of a court of record and enforced as such judgment, provided the terms of the arbitration include such provision.

7. The regents may remove any member of such committee from office who shall have been found guilty, after due hearing, of malfeasance in office or neglect of duty.

8. No member of the committee shall participate in any way in the hearing or determination of any charges in which he may be either a witness as to facts or an accused, nor in any case where the parties, complainant or accused, are related to him by consanguinity or affinity within the sixth degree. The degree shall be ascertained by ascending from the member of the committee to the common ancestor and descending to the party, counting a degree for each person in both lines, including the member of the committee and the party and excluding the common ancestor.

9. Should, for any reason, three or more members of the committee be disqualified from participating in the hearing and decision of any case, or be for other reasons unable to participate therein their places may be temporarily filled for the purpose of determining the case to be heard by the remaining members of the committee nominating twice the number of candidates for such vacancy from whom there shall be selected by the chairman of the committee, after notice to the respective parties, the necessary number of members to constitute a quorum. A quorum of the committee shall consist of six members.

10. Such committee shall have power to make such rules and regulations for the conduct of its business as it shall deem necessary, provided such rules and regulations do not conflict with any of the provisions of this article.

11. The committee shall have power, where a proceeding has been dismissed, either on the merits or otherwise, to relieve the accused from any possible odium that may attach by reason of the making of charges against him, by such public exoneration as it shall see fit to make if requested by the accused so to do. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2 at page 298).

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HAROLD B. WILLE

# Supreme Court of the United States

69  
No. 708—OCTOBER TERM, 1952.

DR. EDWARD K. BARSKY,

Appellant,

—against—

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK,

Appellee.

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APPELLANT'S REPLY TO APPELLEE'S STATEMENT  
OPPOSING JURISDICTION AND MOTION TO DIS-  
MISS OR AFFIRM.

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ABRAHAM FISHBEIN,  
Attorney for Appellant.

# Supreme Court of the United States

No. 798—OCTOBER TERM, 1952.

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In the Matter of the Application

—of—

DR. EDWARD K. BARSKY,

Petitioner-Appellant,

for Review under Article 78 of the Civil Practice Act,  
of the determination of

THE BOARD OF REGENTS OF THE UNIVERSITY OF  
THE STATE OF NEW YORK, suspending petitioner's  
medical license and permission to practice medicine in  
the State of New York for six months,

Respondent-Appellee.

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## APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DIS- MISS OR AFFIRM.

The sole ground upon which Appellee moves to dismiss the appeal or affirm the judgment of the Court below, is that no substantial Federal question is presented. Concededly, every other requisite to this Court's jurisdiction exists.

It is submitted that the motion lacks merit. Plainly the Federal questions presented are not frivolous. The dissenting opinion clearly indicates that there are a number of substantial, Federal constitutional questions involved, that the

holding of the Court of Appeals was unprecedented, and that "the present decision has an importance that \* \* \* reaches far beyond this case. And that—its impact over the years—is what so deeply troubles and concerns me." The American Civil Liberties Union interposed a brief below, as *amicus curiae*, on the Federal constitutional questions. Some 1700 physicians from all over New York State similarly signed and interposed a brief below, as *amici curiae*.

Appellee concedes that Appellant presented Federal constitutional questions in the courts of New York. Actually, these questions were raised in Appellant's answer to the charges Appellee preferred against him, and in the hearings before the Appellee, even before the matter reached the courts. This matter is therefore unlike *Honeyman v. Hanan*, 300 U. S. 14, 17, cited by Appellee, where the record revealed that no Federal question had been presented "In the entire progress of the case to this point of determination by the highest court of the State."

Appellee errs in its claim that no constitutional question was noted in the majority opinion of the Court of Appeals. The opinion held: "Stringent as it is, that statute needs no cutting down, for constitutionality's sake." Appellee errs in its statement that "The only suggestion of a Federal question was in the last two paragraphs of the dissenting opinion." Judge Fuld mentioned constitutional questions elsewhere throughout his dissent. A succinct, three-page summary of some of the Federal constitutional questions is contained in the dissent, 305 N. Y. at 107-9.

On Appellant's motion, the Court of Appeals added to the remittitur, a certificate that Federal constitutional questions were presented and necessarily passed upon. Appellee opposed the granting of a certificate, both orally on the presentation of Appellant's order to show cause to Judge Desmond who wrote the majority opinion, and in its brief in opposition to Appellant's motion, where Appellee advanced the

same contentions and citation it advances on its motion here. The certificate was granted, but not pro forma. The Federal constitutional questions were not "incidental." The Court below stated in its certificate that they were "necessarily passed upon." The opinions below and the Statement as to Jurisdiction show they are fundamental. In its mentioned brief below, Appellee alluded to "the importance of the rights invoked by the Petitioners," when discussing why "These appeals \* \* \* were given extraordinary time and attention by this Court." In addition, the Court of Appeals granted a stay of the suspension of Appellant's medical license, pending the outcome of the appeal to this Court. The discipline imposed upon Doctors Auslander and Miller, was also stayed pending the final determination of this appeal, and the final status of their cases is being held in abeyance pending that determination. Subsequently, the Chief Judge of the Court of Appeals granted leave to appeal to this Court.

Appellee's claim of lack of a substantial Federal question, is contained in one generalized sentence without supporting arguments or authorities. Appellee makes no claim that the questions presented are frivolous or that they are foreclosed by prior decisions of this Court. Appellant's Statement as to Jurisdiction shows that the Federal questions are substantial and are not foreclosed by any prior decision of this Court. On the contrary, it is submitted they were decided in a manner that conflicts with the decisions of this Court.

Appellee comments that the Federal questions are about as thin as the Statement of Jurisdiction is thick. A worn phrase is hardly a substitute for supporting arguments or authorities. As to the length of Appellant's Statement, we state candidly that despite numerous, diligent efforts, we simply found it impossible to shorten the Statement and still present the issues adequately. Brevity, of course, is preferable, where possible. Yet an attorney may find himself required to choose between a brevity to which the particular situation may not lend itself, and a greater length, which his

considered judgment deems essential. Here, the constitutionality of the statutes involved has never been passed upon; the issues are of far-reaching importance to all professions and pursuits; a summary of the factual situation was necessary to an understanding of the Federal questions; and a number of separate and distinct Federal questions were involved, each of which is substantial, and each of which required analysis, arguments, and authorities. We therefore ask indulgence for the length of the Statement as to Jurisdiction.

Appellant submits that this case is within the appellate jurisdiction of this Court, that substantial Federal questions are presented, and that Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

ABRAHAM FISHBEIN,  
Attorney for Appellant.

DEC 9 1953

HAROLD B. WILLEY, Clerk

# Supreme Court of the United States

OCTOBER TERM 1953 — No. 69.

DR. EDWARD K. BARSKY,

Appellant,

—against—

THE BOARD OF REGENTS OF THE UNIVERSITY OF  
THE STATE OF NEW YORK.

---

## BRIEF FOR APPELLANT.

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# Supreme Court of the United States

OCTOBER TERM 1953.

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No. 69

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DR. EDWARD K. BARSKY,  
Appellant,

—vs.—

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

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## BRIEF FOR APPELLANT.

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### Opinions Below.

The majority and dissenting opinions in the Court of Appeals of the State of New York appear at R. 64 and are reported in 305 N. Y. 89.

The opinion of the Appellate Division of the State of New York appears at R. 62 and is reported in 279 App. Div. 1117. Said opinion states it was based upon the authority of a prior decision of the same Appellate Division in a cause that subsequently became a companion cause; that prior decision is reported in 279 App. Div. 447.

The report and opinion of the Regents' Committee on Discipline appears at R. 36.

The report and opinion of the Sub-Committee of the Regents' Committee on Grievances appears at R. 30.

### **Jurisdiction.**

The jurisdiction of this Court is conferred by Section 1257(2) of Title 28 of the United States Code.

The judgment of the Court of Appeals of the State of New York was entered February 26, 1953. Application for re-argument was made March 5, 1953 and denied April 16, 1953, at which time the Court of Appeals granted Appellant a stay pending this appeal. Application for appeal to this Court was made May 7, 1953. This Court noted probable jurisdiction October 12, 1953.

### **The Statutes Involved.**

N. Y. Education Law, Section 6514(2b) authorizes the revocation or suspension of a physician's medical license upon his conviction "in a court of competent jurisdiction, either within or without this state, of a crime." Section 6515 sets forth the procedure in disciplinary proceedings.

The statutes are set forth in the Appendix.

### **Statement of the Case.\***

Appellant is a physician and surgeon of some thirty years of the highest standing in his profession and in his community. On September 28, 1951, the Appellee (hereafter referred to as the Regents) suspended Appellant's medical license for six months by reason of his conviction in 1947 in the U. S. District Court, District of Columbia, for failure to produce before the House Un-American Activities Committee, subpoenaed records of a charitable relief organization known as the Joint Anti-Fascist Refugee Committee, of which Appellant occupied the unsalaried post of chairman.

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\* The designation "S.M. p." refers to the pages of the typewritten stenographic minutes of the hearing held before the Regents' Sub-Committee of the Medical Committee on Grievances. By stipulation, printing of these minutes was dispensed with; they were handed up to this Court together with all exhibits introduced at the hearing, the same procedure as in the Court of Appeals.

Appellant and other members of the executive board of the organization, among whom were a number of physicians, were indicted on two counts: one for conspiracy to fail to produce the records, and the other for failure to produce them. On the trial, the then attorneys for Appellant and the others indicted, delimited themselves to the constitutional issues involved and to the defense of lack of custody or control. As the dissenting opinion in the Court of Appeals noted:

"The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6515, subd. 4; Sec. 6517). It summarized 'the issues litigated and not litigated at the criminal trial' in this way: 'There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient.' The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment." (R. 70)

Appellant was acquitted of conspiracy not to produce the books. Yet he was convicted of failure to produce the books of which admittedly he did not have possession, of which the Attorney General of New York acknowledged that the executive secretary (and not Appellant) "was the legal custodian" (S.M. p. 370), and of which the executive secretary who did have possession was also later convicted.

Appellant's conviction was affirmed, one Judge dissenting (*Barsky, et al. v. U. S.* 167 F. 2d 241); certiorari was denied in June 1948 (334 U. S. 843), and rehearing was denied two

years later with a notation that two of the Justices were of the opinion that the petition should be granted (339 U. S. 971).

Appellant was sentenced to six months. He actually served five months in prison, thus suffering at the same time an actual suspension of his medical license for those five months.

Following Appellant's conviction, the Regents commenced proceedings against Appellant in 1948 to revoke his medical license under Sections 6514 and 6515 of the New York State Education Law, on the ground that he had been convicted of a crime (R. 1). Appellant interposed an answer in which he detailed claimed violations of the Federal Constitution and set forth defenses on the merits (R. 3).

On the hearing before the Regents' Sub-Committee of the Medical Committee on Grievances, Appellant offered evidence on the merits to show that although he had been found guilty on the narrowly limited criminal trial, he was not actually guilty, and that no moral turpitude was involved. The Regents' Committee on Discipline in reviewing the matter, later stated: " \* \* \* Respondent's motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here" (R. 53).

This was the admittedly uncontradicted evidence adduced by Appellant. In 1942 the Joint Anti-Fascist Refugee Committee was formed to aid some 500,000 refugees who fled from Spain following the Franco victory. Documentary evidence including photographs introduced at the hearing, show these men, women and children were homeless, ill, and undernourished; some were without arms or legs, some were blind, and some had to be carried over the Pyrenees into France. Dr. Joy, Director of the Unitarian Service Committee which distributed the funds for this Joint Anti-Fascist Refugee Committee in France, testified that "of the Spanish Republican refugees concerned, only a small proportion were Communists" (R. 57).

The organization raised over a million dollars from 1942 to 1947, besides clothing and similar relief in kind. As the Regents' Committee on Discipline reported: " \* \* \* the official position of the United States was then anti-Franco" (R. 58).

The organization distributed this money and relief to other organizations like the Quakers, the Unitarians, the Christian Board of Missions, and the Committee in Mexico, all of whom handled the actual disbursing of the funds and relief, and all of whom used the money to build and maintain hospitals in France and Mexico, a convalescent home, a rest home for tubercular and undernourished children, and to provide medical aid, food, clothing and shelter. Photographs of the hospitals, homes and inmates, are in the record. The Regents' Committee on Discipline found: " \* \* \* there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion" (R. 57).

The organization had a paid, executive secretary who was acknowledged by the Attorney General of New York in the hearing before the Regents' Sub-Committee of the Medical Committee on Grievances, to be "the legal custodian" of its books (S.M. p. 370). Appellant served as chairman without remuneration and within the limited time his active practice permitted (S.M. p. 222).

The organization was concededly licensed by and rendered reports to the President's War Relief Control Board. It received complete tax exemption as a charitable organization from the Treasury Department. The money it sent the Quakers for relief in Africa, for example, was cleared through and approved by the State Department and the Federal Reserve Bank. Some of the relief obtained by the organization was distributed in conjunction with the United Nations Relief and Rehabilitation Association. Its relief was recognized by the French Government. In some cases it was called upon for aid by the U. S. State Department. Newspapers like the New York Times and the Herald Tribune carried

editorials praising the organization and requesting funds for it (S.M. p. 296). Eminent persons from all walks of life and all professions supported its efforts (S.M. pp. 220-1, 280, 297-8).

The Attorney General of New York conceded that at the time "the various governments throughout the world had ceased relations with the Franco regime" (S.M. p. 219).

On about December 1, 1945, the House Un-American Activities Committee, without any notice to the organization, attempted to have the War Relief Control Board revoke the organization's license. The request was refused. The House Committee then served a subpoena upon the executive secretary for the production of records including the names of the contributors to and the recipients of the charity of the organization. It served a similar subpoena upon Appellant although he did not have such custody. The executive board voted to refuse to turn over its books to Appellant. One of its reasons was that the secretary, who had possession, had already been served.

The organization and Appellant were then faced with a problem of trust and confidence; having been entrusted with these names, they were fearful that revealing them would cause financial and other harm to the contributors, and would cause imprisonment and execution of those families of the contributors and recipients who were still in Spain. That their fears were reasonable was borne out later by the fact that even before the aforementioned indictments, testimony given by one of the board members of the organization before the House Committee, found its way to a newspaper in Spain (S.M. p. 240; Ex. HH). Appellant testified without contradiction, that had the names of the contributors and recipients been included in that testimony, their families in Spain would have been imprisoned and executed (S.M. pp. 237, 239).

The Regents' Committee on Discipline reported:

"The Attorney-General formally conceded that Respondent 'was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them'; that the opinion on the constitutional question held by Respondent's counsel 'was held by many lawyers and some jurists'; that there were 'expressions in some legal journals' that the subpoenas were illegal; and that such an opinion was held by one of the judges of the Court of Appeals before which the case came up on appeal. Later the Attorney-General stated:

"I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part; and again:

"I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable.'

"Second, as bearing on the motives of Respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney-General made the following concession:

"\* \* \* \* I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the conduct of the House Committee on Un-American Activities at the time."

"The Attorney-General conceded further that Congressmen were included among the 'people of prominence' who held such views, and that there were Con-

gressmen who at that time made speeches 'against the activities of (the Congressional Committee) against its procedure and otherwise.'

"The principal reasons given by Respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country whose purpose is in part to conduct activities abroad,' and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945, asked the President's War Relief Control Board to cancel the

Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and pre-judgment. . Finally, they asserted they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might, if necessary be determined by the courts.

"If these views were honestly held and these assertions honestly made they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (*Sinclair v. United States, supra*). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record, discloses no such basis.

"A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But there is no such evidentiary showing. It may be that some of those connected with the Refugee Committee, perhaps Respondent among them, had Communist affiliations, and it may be that through them the Refugee Committee was led into some unspecified subversive activity; but there is no legal evidence to support these hy-

potheses and conjecture cannot take the place of evidence.

\* \* \* \* \*

"There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. Dr. Joy testified also that, of the Spanish Republican refugees concerned, only a small proportion were Communists. There is evidence also in Respondent's Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board did, in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.

"There is ground also for conjecture, favorable to Respondent's position, as to how the situation eventuating in the criminal trial may have arisen. It appears from testimony in the criminal trial by Congressman Wood, Chairman of the Congressional Committee, that the Congressional Committee had received complaints about the Refugee Committee, most of which 'simply complained that they engaged in political propaganda.' Since the Refugee Committee was engaged in raising money for the relief of Spanish Republicans, it is natural that some of its literature, and some of the speeches at meetings and on street corners,

should have been anti-Franco and pro-Spanish-Republican; \* \* \*. It may well be that this might have been thought to be a violation of the condition of the Refugee Committee's license from the President's War Relief Control Board that it should engage solely in relief and not in political action or propaganda; \* \* \* the Refugee Committee's license was not revoked. But assuming that such literature and statements are to be considered propaganda (rather than an incident of fund-raising), there is no showing that it was un-American or subversive propaganda, since the official position of the United States was then anti-Franco." (R. 53)

As a sample of the opinion of the time, the record contains this excerpt from 14 Chicago Law Review 256, 261:

"Few subpoenas have ever been so broad as the one recently issued by the House Committee against the Joint Anti-Fascist Refugee Committee. The courts have always found some restriction as to time and subject matter. Here there is none. It should occasion little surprise then if the subpoena issued by the House Un-American Activities Committee were to be declared invalid." (S.M. p. 309)

The article concluded that:

"The investigating activities of the House Committee on Un-American Activities rest upon rather insecure constitutional foundation."

The record also contains an excerpt from 60 Harvard Law Review 1193, 1234, concluding that:

"Nothing in recent years has been as un-American as the conduct of the hearings of the Congressional Committees on un-Americanism." (S.M. p. 313)

Similar sentiment was expressed in 43 Illinois Law Review 253; 22 Southern California Law Review 464; 33 Cornell Law Quarterly 565.

Appellant testified that this was a "test case," this was the first time the issue had arisen as to whether the activities of the House Committee were constitutional (S.M. pp. 235, 308). An article in 47 Columbia Law Review 416, agreed that: "The questions posed by the operations of the Committee on Un-American Activities have never been judicially answered."

The uncontradicted testimony indicates beyond doubt that Appellant had compelling moral and legal reasons for his position.

Appellant answered all questions asked of him by the House Committee. However, because the executive secretary who had the books, did not produce them, Appellant and the others, as well as the executive secretary, were indicted and convicted as mentioned.

On April 25, 1951, the Regents' Sub-Committee of the Medical Committee on Grievances, which first heard the matter, recommended that Appellant's license be suspended for three months.

The Attorney General of New York had adduced testimony over objection that the organization had been placed on a list by U. S. Attorney General Tom C. Clark (only subsequent to Appellant's conviction), and that dismissal of the complaint of the organization against the U. S. Attorney General in connection with that listing, had, at the time, been affirmed by the U. S. Court of Appeals (S.M. p. 399). The Sub-Committee of the Medical Committee on Grievances plainly made that listing a prime if not the sole basis of its decision (R. 33).

On April 25, 1951 the entire Medical Grievance Committee, which did not hear any of the testimony, recommended, by a vote of six to four, to increase the length of the suspension to six months.

Subsequently, this Court reversed the decision of the U. S. Court of Appeals and upheld the complaint of the organization in connection with the listing (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123).

On July 31, 1951, the Regents' Committee on Discipline, which heard and reviewed the matter, wrote a carefully detailed report (R. 36) in which doubt was expressed as to the jurisdiction of the Regents and in which it stated it was taking jurisdiction to enable the courts to pass upon the matter (R. 47). That Committee further found that there was no contradiction whatsoever as to the motives or any of the other testimony involved, and that Appellant had adopted "the traditional method" of testing the constitutionality of the House Committee's course, citing *Sinclair v. U. S.*, 279 U. S. 263, 299 (R. 55-56).

The Committee concluded:

"We disagree with the Attorney-General's position, \* \* \* reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts, that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced.

"Since violation of the Federal Statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that Respondent's license be not suspended as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded." (R. 59)

Despite the fact that the Committee on Discipline called the Regents' attention to the mentioned reversal by this Court in connection with the listing, subsequent to the decision by the Medical Committee on Grievances (R. 56), the Regents disregarded the report and recommendation of their own Committee on Discipline, they disregarded the reversal by this Court in connection with the listing, and on September 8, 1951 they voted to accept the determination and recommendation of the Medical Committee on Grievances and confirmed the imposition of a six months' suspension without hearing any witnesses or stating any reasons or grounds (R. 59). The organization was first placed upon the U. S. Attorney General's list some eight months after Appellant's indictment and four months after his conviction. As the dissenting opinion of Judge Fuld pointed out:

"The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances made, it must be remarked, on a record less complete than the one before the Committee on Discipline. While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance, that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that 'Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States.' Reliance upon that fact was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.)" (R. 77)

Appellant then instituted a proceeding to review the determination of the Regents, in the Supreme Court of the State of New York, Albany County. The matter was transferred on November 8, 1951 to the Appellate Division of the Supreme Court, Third Department, which in this case was the court of first instance. Prior to argument, the court heard argument in the cases of Dr. Auslander and Dr. Miller, two other physicians who were members of the executive board of the organization and who had also been convicted in the Federal Court in the District of Columbia. The court affirmed the determination in this case of Dr. Barsky, on the basis of its opinion in the prior case of Dr. Auslander and Dr. Miller, and then granted leave to appeal (279 App. Div. 1122), on the ground that a question of law was involved which should be passed on by the Court of Appeals. On February 26, 1953 the Court of Appeals affirmed the determination in all three cases. The majority opinion was written by Judge Desmond. The dissenting opinion was written by Judge Fuld.

By stipulation and order of the Court of Appeals, the final disposition of the cases of Dr. Auslander and Dr. Miller are being held in abeyance pending the outcome of this appeal.

#### **Specification of Errors.**

The respects in which the Court of Appeals of the State of New York erred are set forth in the assignment of errors (R. 84). The specifications in substance charge that the Court erred:

- (1) In holding that Appellant was not deprived of due process by a construction of the undefined word "crime" in Section 6514(2b) of the N. Y. Education Law so unlimited in scope and so vague, that the medical licenses of Appellant and all New York physicians are subject to suspension or revocation upon conviction "anywhere" in the world of any act that is deemed an offense there but that is not an offense or may be "even meritorious" in New York.

(2) In holding that the statutes involved do not violate due process and the constitutional guarantee against double punishment despite the addition of a suspension of Appellant's medical license to the jail sentence Appellant has already served, for an act that admittedly involves neither moral turpitude nor intellectual unfitness, that is not related to the practice of medicine, that is not an offense in New York, and that is the traditional method of testing the constitutionality of legislative acts.

(3) In holding that Appellant was not deprived of due process and a fair hearing despite the conceded "gross and prejudicial error" in the admission in evidence of and the predication of a finding by the Regents on, the listing of the organization by the U. S. Attorney General, further despite the admission in evidence of a judicial dismissal of the organization's complaint against the listing, and still further despite the disregard by the Regents of the subsequent reversal by this Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.

(4) In holding that the sections did not deprive Appellant of due process despite the conflicting and unreasonable constructions thereof whereby the licenses of New York physicians are not subject to suspension or revocation on conviction of a felony outside of New York that is not a felony in New York even though it involves moral turpitude, but whereby those licenses are subject to suspension or revocation under the same section on conviction outside of New York of the lesser offense of a misdemeanor that does not involve moral turpitude and that is no offense in New York.

(5) In holding that the sections do not violate the constitutional precept against legislative abdication even though the only "standards" to guide the Regents in selecting offenses which the Regents may discipline, are "the good sense and judgment of our Board of Regents."

(6) In holding that the statutes do not violate the constitutional precept against legislative abdication despite the fact that they leave the measure of punishment to be imposed upon Appellant and all New York physicians convicted of any offense anywhere in the world, solely to the "good sense and judgment" of the Regents without standards correlating the measure of punishment with the type of offense and without the right of judicial review.

(7) In holding that the hearing mentioned in the sections is limited to a hearing before a sentencing judge, solely for purposes of the measure of punishment and not as to the physician's actual guilt or innocence, and that this did not deprive Appellant of a genuine and judicial hearing and of due process.

(8) In failing to hold that the statutes as construed and applied disregard the constitutional precept that a State cannot impose a domestic penalty for acts occurring in the District of Columbia where the United States has sole power of legislation and exclusive jurisdiction, especially in the absence of substantial relationship between the act and the need for protection of the citizenry of New York.

(9) In refusing to hold that the sections as applied disregard a law of the United States, Title 18 U. S. C. Section 402, which indicates that the contempt of which Appellant was convicted is not a crime but may be punished as though it were.

(10) In refusing to hold that the sections as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and therefore violate, Article 1, Section 7 of the Constitution.

### Summary of Argument.

I. Appellant contests the validity of Section 6514(2b), N. Y. Education Law, which permits revocation or suspension of a physician's license upon his conviction of "a crime" outside of New York. The Court below construed the term "crime" in the section so that revocation or suspension may be imposed in the sole discretion of the Regents though the offense on which the conviction was predicated is no offense and may be "even meritorious" in New York (R. 75). Appellant's failure in 1947 to produce before the House Committee the relief organization's records of which admittedly he had no possession, his failure to breach the confidence and trust reposed in the organization and in him, and the resulting contempt of which he had been convicted, are, concededly, no offense in New York (R. 45, 65). Concededly no moral turpitude was involved (R. 59, 67). Concededly Appellant had adopted the "traditional method by which such legal questions (constitutionality—our note) are raised (*Sinclair v. United States*, 279 U. S. 263)" (R. 55-6).

The section with its meaning so fixed, deprives physicians "of their right to practice if they offend against *any* law, *any* place," and "is too vague, too capricious, too unrelated to anything that a citizen of our State is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty, that may destroy a person professionally, that may result in the loss 'of all that makes life worth living,'" as Judge Fuld noted in his dissent (R. 79). This is particularly true because: (a) "crime" is limited by Section 22 of the N. Y. Penal Law and by the Court of Appeals elsewhere, to violations of the statutes of New York; (b) the Court of Appeals agreed it is the declared policy of New York not to impose domestic punishment for extra-territorial crime (R. 66, 69); (c) the states do not enforce the criminal laws of the United States; and (d) because for domestic purposes, the Court of Appeals has heretofore uniformly construed the term "crime"

to be restricted to foreign offenses that are also offenses in New York even though the phrase involved (as here), includes conviction of a crime in "any other state." *People ex rel. Marks v. Brophy*, 293 N. Y. 469.

Further, not only is the term "crime" undefined and unlimited in Section 6514, but the meaning attributed to "felony" in subdivision (1) conflicts with the meaning attributed to "crime" in subdivision (2b) of the same section. The "felonies" in subdivision (1) are restricted to those that are also made felonies under New York law; but here, the Court of Appeals adopted a discriminatory and conflicting definition, holding that even though "crime" in subdivision (2b) includes felonies as well as misdemeanors (R. 66), nevertheless it is *not* limited to offenses that are also made offenses in New York but that subdivision (2b) applies though the offense of which the physician was convicted is no offense or may be "even meritorious" in New York.

This is the result: when physicians (and the principle applies to lawyers and engineers), are convicted of federal felonies that are not felonies in New York, their licenses are not revoked under subdivision (1) of the same section of 6514, though moral turpitude is involved. But when a surgeon like Appellant is convicted of a *lesser* federal offense, namely of what is deemed a federal misdemeanor, that admittedly does *not* involve moral turpitude, that is not related to the medical practice, and that resulted from testing constitutionality, his license may be revoked or suspended under subdivision (2b) of the same Section 6514.

There is no rational justification for the discrimination, nor any relationship to the medical practice or to the welfare of the citizenry of New York.

Still further, although in its extended sense the term "crime" may mean any violation of law, nevertheless from Blackstone to the present it has been uniformly agreed that "in *common usage* the word 'crime' is made to denote such offenses as are of a *deeper or more atrocious dye*; while smaller faults and omissions of less consequence are com-

prised under the gentler name of 'misdemeanors' only." Section 6514(2b) requires conviction of a "crime". Appellant was convicted of what is deemed a federal misdemeanor, and not of a "crime" as it is commonly understood.

The right to continue in the practice of medicine is a right to liberty and property. The statute is admittedly penal in nature. The statute must be strictly construed. The vagueness doctrine applies. To deprive New York physicians of their licenses "if they offend against any law, any place" in the world, does not delimit the application of the term "crime", but "leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against"; it violates the "fair notice" precept, because "men of common intelligence must necessarily guess at its meaning and differ as to its application." *U. S. v. Cohen Grocery Co.*, 225 U. S. 81, 89; *Winters v. New York*, 333 U. S. 507, 524; *Lanzetta v. New Jersey*, 306 U. S. 451, 453.

It is agreed that Appellant was testing constitutionality in his criminal trial (R. 48, 49, 55, 70). To impose this suspension in addition to the jail sentence and the original, actual suspension of his medical license suffered during his incarceration, is to violate the precept that "When the penalties" are "so severe as to intimidate" persons "from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited" them from "seeking judicial construction of laws which deeply affect" their rights. *Ex Parte Young*, 209 U. S. 123, 146, 147.

The sole "standard" to guide the Regents in selecting those "crimes" upon the conviction of which they may impose discipline, is the "good sense and judgment of our Board of Regents" (R. 67). But as Judge Fuld noted: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action," and "Such delegation, uncontrolled, in my judgment, as it is, violates first principles" (R. 79).

II. The Court of Appeals and the Regents agreed that no moral turpitude or professional unfitness was involved in the offense of which Appellant had been convicted (R. 59, 67, 70, 72). Appellant's offense was the "only method" and "the traditional method" by which constitutionality is tested, as the Regents' Committee on Discipline reported (R. 55).

Appellant has already suffered one punishment, namely five months in jail and an actual suspension of his license during his imprisonment, for testing constitutionality. To impose an additional suspension now in the absence of even moral turpitude or professional unfitness, in connection with an offense that is not related to the practice of medicine, would be the imposition of double punishment for the same offense. It is not within the province of the Regents to add punishment to punishment. Its sole province is to "protect the people from the ministrations of incompetent, incapable and ignorant persons, and to avoid the consequent harm to the health and physical well-being." *People v. Laman*, 277 N. Y. 368, 381.

"But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise" (Judge Fuld's dissent, R. 78). The legislation at bar must bear a "real and substantial relation to the public health, safety, morals, or some other phase of the general welfare"; otherwise it will "invade rights guaranteed by the Fourteenth Amendment." *Liggett v. Baldridge*, 278 U. S. 105, 111. *Herndon v. Lowry*, 301 U. S. 242, 258. Conditions imposed upon professional practice or the continuance thereof, must bear a real and substantial relationship to the profession involved. *Douglas v. Noble*, 261 U. S. 165, 168. *Dent v. West Virginia*, 129 U. S. 114, 121. *Cummings v. Missouri*, 4 Wall. 277, 319, 320. *Ex Parte Garland*, 4 Wall. 333, 377, 379. Discipline requires at least the presence of moral turpitude. *Jordan v. DeGeorge*, 341 U. S. 223, 227.

In the absence of even moral turpitude or professional unfitness, "his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest," as Judge Fuld noted (R. 79). The law abhors double punishment for the same offense. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex Parte Lange*, 85 U. S. 163, 168.

III. On the hearing before the Sub-Committee of the Medical Committee on Grievances, the Attorney General of New York repeatedly introduced evidence, over objection, to the effect that the then U. S. Attorney General had placed the organization on one of his lists (only *after* Appellant's conviction), that the complaint of the organization against the listing had been dismissed in the Federal Court and that the dismissal had been upheld in the U. S. Court of Appeals. The Medical Grievance Committee then imposed a six months' suspension. Subsequently, however, the listing decision was *reversed* by this Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. This reversal was called to the Regents' attention by their Committee on Discipline (R. 56). The Regents simply disregarded the report and recommendation of their own Committee on Discipline, disregarded the reversal by this Court, and accepted the recommendation of the Medical Committee on Grievances which was predicated primarily if not solely, upon that listing (R. 33). Judge Fuld stated that this was a "gross and prejudicial error" (R. 77).

The majority admitted the error, but, without factual or legal basis, treated it as one committed before a sentencing judge and not in a regular hearing, stated that the error was related only to the measure of punishment, and concluded that therefore the Court was "wholly without jurisdiction to review" (R. 68).

If the Regents can simply disregard the reversal by this Court, if it can overlook the "gross and prejudicial error" mentioned, "If the statutory authority of the Regents is, in truth, as the Court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits" especially "where that exercise (of discretion—our note) is unsupportable on rational grounds and becomes arbitrary and capricious" (Judge Fuld, R. 78).

The result was neither a fair, genuine or judicial hearing. It was a hearing and a decision based on an erroneous and reversed principle of law. It violated Section 6515(5) N. Y. Education Law which requires a determination based on "legal evidence." It deprived Appellant of due process. *Chin You v. United States*, 208 U. S. 8; *Ng Fung Ho v. White*, 259 U. S. 276, 284. It violated the "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U. S. 457, 463.

#### IV. The sections as construed and applied, violate the precept against legislative abdication.

(a) The only "standards" to guide the Regents in selecting those offenses for the conviction of which they may impose discipline, are "the good sense and judgment of our Board of Regents." This is no standard or limiting guide, especially since the Legislature "did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries \* \* \* and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license" (Judge Fuld, R. 74).

(b) The only "standards" to guide the Regents as to the measure of punishment to be imposed on physicians convicted of offenses, is again left to the "good sense and judgment" of the Regents, without even an attempt to insist on correlating the measure of punishment with the type of offense. The Regents thus have it within their unlimited power to re-

verse legislative intent by imposing revocation for slight offenses that may be "even meritorious" in New York, and by imposing a mere censure for serious offenses.

The legislative abdication is the more apparent in view of the statement by the majority that the courts are "wholly without jurisdiction to review" the measure of punishment imposed (R. 68) even though, as the dissent noted, the Regents' exercise of discretion in that regard, is "arbitrary and capricious" and "unsupportable on rational grounds" (R. 78).

(e) There was further legislative abdication as evidenced by the holding that the hearing mentioned in Section 6515 may be treated as a hearing before a sentencing judge, that the sole purpose of the hearing is to arrive at a measure of punishment and not to review the physician's actual guilt or innocence. This deprived Appellant of the protection of a real hearing and a determination of the "charges upon their merits" Section 6515(4). It is discriminatory against Appellant and all physicians because the Court of Appeals held elsewhere that though a lawyer may have been convicted of a federal felony by a Federal Court and jury, and though his conviction may have been affirmed by the U. S. Court of Appeals, nevertheless when he is brought up for disbarment the Board may and actually did review and found him not guilty and refused disbarment. *Matter of Donegan*, 294 N. Y. 704; 282 N. Y. 285.

This legislative abdication, without any standards or guideposts, makes the Regents absolute and immune in their power and in the unlimited discretion granted them. It promotes rule by men and not by "those impersonal forces which we call law." *Youngstown v. Sawyer*, 343 U. S. 579, 654; *Yick Wo v. Hopkins*, 118 U. S. 356, 369. It offends the "traditional notions of fair play and substantial justice."

V. Physicians, lawyers and engineers, when convicted of federal felonies involving moral turpitude that are not made

felonies by the laws of New York, receive the benefit of the interpretation and policy adverted to before. But here, the Court below held that a surgeon, convicted not of a federal felony but of a misdemeanor, not involving moral turpitude, not related to the medical practice, will not receive the benefit of that interpretation and policy and may have his license suspended or revoked. There is no basis in justice, reason or in relationship to the medical practice, for such discrimination. It is invalid as discriminatory, class legislation. *Concordia v. Illinois*, 292 U. S. 535, 545. *Barbier v. Connolly*, 113 U. S. 27, 32. *Yick Wo v. Hopkins*, 118 U. S. 356, 373-4.

Because of the listing of the organization, the disregard by the Regents of the reversal by this Court in the listing case, the temper of the times, and the change in political climate from original hostility to a favoring of the Franco regime, there is reason to believe the statutes were employed as a bill of attainder "to impose pains and penalties for past lawful association \* \* \*," *Wieman v. Updegraff*, 344 U. S. 183; and "as a means for the infliction of punishment," *Ex Parte Garland*, 4 Wall. 333, 379.

VI. The offense of which Appellant was convicted occurred in the District of Columbia. The states cannot impose a domestic penalty for acts occurring in the District of Columbia where the United States has sole power of legislation and exclusive jurisdiction, especially in the absence of substantial relationship between the act complained of and the need for protection of the citizenry of New York, because "the State undertakes in this manner to go beyond its jurisdiction into territory where the United States has exclusive control." *Western Union v. Brown*, 234 U. S. 542, 547. *Western Union v. Chiles*, 214 U. S. 274, 278.

VII. Title 18 U. S. C., Section 402, enumerates those contempts which constitute "crimes". The alleged contempt of which Appellant was convicted is not listed there as a crime.

The section adds that other contempts may be punished according to other provisions of the law. Title 2 U. S. C., Section 192, under which Appellant was convicted, does provide for such punishment and states that the act shall be "deemed" a misdemeanor. Reading both sections together and according to the word "deemed" its natural meaning in its proper context as a "deeming" for "purposes of punishment," results in the conclusion that the act of which Appellant was convicted is not a crime but may be punished as though it were. But since it is not a crime, the Regents lacked jurisdiction because Section 6514(2b) requires conviction of a "crime". To denote the offense of which Appellant was convicted as a "crime", is to ignore a law of the United States, namely, Title 18 U. S. C., Section 402, in violation of Article VI of the Constitution.

VIII. Title 2 U. S. C., Section 192, under which Appellant was convicted, is the product of a Joint Resolution and not a Law, of Congress. Though a Joint Resolution and a Law go through the same preliminary processes, there is a distinct differentiation, stated in Article I, Section 7, of the Constitution. A Law becomes part of the law of the land. A Joint Resolution "takes effect" and merely expresses the sense or will of the Congress. In fact doubt was expressed in Congress when the Joint Resolution at bar was adopted.

Crimes must be predicated upon a Law or an Act of Congress, and not a Joint Resolution. *Donnelly v. U. S.*, 276 U. S. 505, 511. So that again, the contempt of which Appellant was convicted is not a crime. A Joint Resolution has "the effect" of law, but is not a Law. *Watts v. U. S.*, 161 F. 2d 511, c.d. 68 S. Ct. 81. Things equal in effect only, are not identical.

To disregard the differentiation mentioned in the Constitution between a Law and a Joint Resolution, is to disregard Article I, Section 7, of the Constitution.

**POINT I.**

**The statutes under which Appellant's medical license was suspended, are so vague, unlimited, indefinite, capricious and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment.**

Section 6514(2b) of the N. Y. Education Law permits suspension or revocation of a medical license upon the conviction of a New York physician "in a court of competent jurisdiction, either within or without this state, of a crime." In 1947 Appellant was convicted in the Federal Court in the District of Columbia, of failure to produce the organization's records before the House Committee. This act is deemed a misdemeanor under Title 2 U. S. C., Section 192, which does not require that the person subpoenaed have possession or control of the records. There is no such offense in New York. The Regents' Committee on Discipline noted: "default in the production of subpoenaed documents before the Congress or a Congressional committee is not a violation of any provision of the New York law" (R. 45).

The word "felony" is defined in Section 6514(1) by reference to Section 6502, as "any offense which if committed within the State of New York would constitute a felony under the laws thereof." The word "crime", however, is not defined in Sections 6514 or 6515. The Court of Appeals stated that it includes felonies and misdemeanors (R. 66). According to the Court of Appeals herein, Section 6514 means that if a New York physician is convicted outside of New York of what is a *felony* in the foreign jurisdiction but that is no offense in New York, his license cannot be revoked under subdivision 1, but if he is convicted "anywhere" in the world of an act that is a "crime" (felony or misdemeanor) there, but which in New York is either no crime or is "even meritorious" (R. 67), his license is subject to revocation under subdivision 2b. The Court of Appeals further held that the

"crimes" for which the Regents may revoke or suspend a physician's license, are left to the "good sense and judgment of our Board of Regents" (R. 67).

This position of the Court of Appeals is unprecedented, contradictory, and unsupported by any cited or other authority. In his dissent, Judge Fuld stated that the statute with its meaning so fixed, is unconstitutional because:

"A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to 'the good sense and judgment' of the Regents, but, while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that 'crime' has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living' (*Ng Fung Ho v. White*, 259 U. S. 276, 284). Such delegation, uncontrolled, in my judgment, as it is, violates first principles." (R. 79)

The word "crime" has always been delimited by Section 22 of the N. Y. Penal Law and by the declared policy of New York against domestic punishment for extra-territorial crime, to offenses committed outside of New York that are also made criminal by a New York statute. This was the position of the dissenting opinion, supported by every known authority. It is also the plain policy of subdivision 1 of Section 6514. Section 22 of the N. Y. Penal Law (McKinney's Consol. Laws of N. Y. vol. 39, Part I, page 27) states that: "No act \* \* \*

shall be deemed criminal or punishable except as prescribed or authorized by \* \* \* some statute of this state \* \* \*." In *People ex rel. Blumke v. Foster*, 300 N. Y. 431, 433, the Court held: "In this State, no act or omission is a crime unless some statute of the State makes it so." Nevertheless the Court held here that "crime" in Section 6514(2b) includes the federal offense of which Appellant had been convicted even though it is no offense in New York.

The Court of Appeals agreed "it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction" but held Section 6514 was too plain for dispute (R. 66). Judge Fuld however, pointed out:

"Experience has taught that sheer literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e.g., *People ex rel. Marks v. Brophy*, *supra*, 293 N. Y. 469; *Matter of Donegan*, 282 N. Y. 285; see, also, *Matter of Garsson v. Wallin*, 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra*, 282 N. Y. 285, 292), we said that discipline 'partakes of the nature of punishment,' with the consequence that statutes imposing discipline 'must be strictly construed,' and, in the *Marks* case (*supra*, 293 N. Y. 469, 474), we declared, to 'decree forfeitures \* \* \* because of violations of the criminal laws of another jurisdiction,' is contrary to the established 'public policy of this State.'

"For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to.

There is nothing new in the word 'convicted \* \* \* without this state'; the *Marks* case (*supra*, 293 N. Y. 469) dealt with virtually identical language and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agreement —*conviction of 'a felony, "either in New York State or any other state"*—declared (293 N. Y., at p. 474):

"The Atkins case (248 N. Y. 46, *supra*), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of "any felony," the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this relator should suffer a similar forfeiture if convicted of "a felony, either in New York State or any other state" meant the same thing."

"Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to warrant the imposition of an additional penalty in this state. It must be a particular kind of conviction."

" 'Felony,' as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan*, *supra*, 282 N. Y. 285) or the governor (*People ex rel. Marks v. Brophy*, *supra*, 293 N. Y. 469) used the word 'felony', they meant only such acts as would be deemed a felony in New York. *Matter of Donegan*, *supra*, 282 N. Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (Sec. 88, subds. 3, 4; Sec. 477; now numbered

Sec. 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old Sec. 88, subd. 4; present Sec. 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and reasonably be presumed that our legislature, when it required disbarment for conviction of a federal 'felony', considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for violations of the laws of another jurisdiction and in view of the requirements that the statute be strictly construed.

"So, here, where the legislature has declared that it must be a conviction of a 'crime', the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving 'felony' and the one before us involving 'crime'—the argument is far stronger for limiting the term 'crime' than it is for limiting the term 'felony'. In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's 'without the state,' if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—'in some other state (or

country) \* \* \* which we in New York consider non-criminal, or even meritorious.'<sup>2</sup>

"It seems almost incredible to me that the legislature could have contemplated that such 'non-criminal' or 'meritorious' acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is pointed out that such 'a literal construction \* \* \* will empower the Board of Regents to destroy a person' without the slightest warrant—that 'some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases' (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst. v. University of State of N. Y.*, 298 N. Y. 184, 190, a 'statute's validity must be judged not by what has been done under it but "by what is possible under it." And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career." (R. 72)

Not only is the word "crime" undefined and unlimited in scope, but the meaning attributed to "felony" in subdivision (1) of the same Section 6514, conflicts with the meaning

<sup>2</sup> The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (Sec. 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) Sec. 55-103, Sec. 41-811, and see *Nations v. State*, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e.g., Ala. Code (1940) tit. 48, Sec. 301 (31a); La. S. A.-C. C. (1950) Art. 45, Sec. 195; N. C. Gen. Stat. (1950) Sec. 62-121.71-72, and see *State v. Johnson*, 229 N. C. 701; S. C. Code (1952) Sec. 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) Sec. 56-329, and see *New v. Atlantic Greyhound Corp.*, 186 Va. 726.) And, in Kansas, it is a crime to sell or even to drink alcoholic liquor in a public place. Kansas Gen. Stat. (1949), ch. 41-719, 803, and see *State v. Shackle*, 29 Kans. 341."

attributed to "crime" in subdivision 2b. Though the same section permits revocation of a medical license upon conviction "of a felony," the meaning of "felony" is limited by subdivision 1 to an act that is made a felony under New York law, but the Court of Appeals held it is not so limited in the case of a "crime" despite the fact that the Court held that "crime" includes felonies and misdemeanors (R. 66).

If it is a felony under the federal law only, the statute is inapplicable according to the authorities mentioned in the majority and dissenting opinions. This is so despite the fact that the physician's act may involve narcotics (*Tonis v. Regents*, 295 N. Y. 286). In fact the Attorney General of New York stated on page 15 of his brief to the Court of Appeals in the *Tonis* case that "the test is \* \* \* whether Dr. Tonis could have been convicted in the State courts and under the State law for the offense \* \* \*." The same test was applied to an engineer's license in *Garsson v. Wallin*, 279 App. Div. 1111, aff'd 304 N. Y. 702. Garsson had been convicted in the Federal Court in the District of Columbia of a federal felony involving moral turpitude; conspiracy to defraud the United States by reason of certain relations with a Congressman. When it was sought to revoke his engineer's license in New York on the ground that he had been convicted of "a felony," the same Appellate Division at the same term as here, held that although he had been convicted of a federal felony, it was not a felony in New York and his license was not revoked since "the offense for which respondent was convicted is related exclusively to an act against the Federal Government. There is no such crime known to the Penal Law of the State of New York \* \* \*." The Court of Appeals there affirmed.

This is the net result:

(a) When a physician is convicted of a federal felony involving narcotics and moral turpitude and is charged

under Section 6514(1) of the Education Law (*Tonis v. Regents*, 295 N. Y. 286), or when an engineer is similarly convicted of a felony involving moral turpitude and charged under Section 7210(1) of the Education Law (*Garsson v. Wallin*, 279 App. Div. 1111, aff'd 304 N. Y. 702), or when a lawyer is convicted of a mail fraud felony and is brought up for disbarment (*Matter of Donegan*, 282 N. Y. 285), the word "felony", which is plainly "a crime," receives one interpretation and the benefit of the policy against domestic punishment for foreign offenses. So settled is this policy, that it applies to a convict who was released on a commutation agreement that provided that the convict must serve out his term if he were convicted of a felony "either in New York State or any other state." Since he was convicted in the federal court of an act that was a felony there but that was not a felony in New York, there was no resulting breach of the commutation agreement and he did not have to serve out the balance of his term (*People ex rel. Marks v. Brophy*, 293 N. Y. 469).

(b) But when a physician is convicted of a *lesser* offense, namely a federal misdemeanor, that admittedly is *no* crime in New York, and that admittedly involves *no* moral turpitude or intellectual unfitness, he is met with a conflicting interpretation and policy, and his license is suspended.

The Court's interpretation of and policy toward "felonies" in subdivision 1 is in flat contradiction of that toward "crime" (which is held to include felonies and misdemeanors) in subdivision 2b.

We fail to perceive any rational justification for this conflict and for this discriminatory interpretation, either in morals, reason or public policy. As the dissent pointed out "the argument is far stronger for limiting the term 'crime' than it is for limiting the term 'felony'" (R. 74).

The majority and dissenting opinions agreed there was no need to discuss the point mentioned by the Regents' Committee on Discipline that although there was no offense in New York identical with the one for which Appellant had

been convicted, there was a "similar" statute, contempt of the N. Y. State Legislature (R. 47), and the majority opinion remarked that this at least showed that New York policy was "in line" with the Federal policy (R. 66, 76). But the Regents' Committee on Discipline pointed out that this "similarity" was merely "assumed" by them (R. 47), not only because the State statute provides only for contempt of the State Legislature and not of Congress, but further because the State statute specifically requires "possession or control" of the books, which is not even mentioned in the Federal statute. In fact "the defense of lack of custody or control" was held to be "legally insufficient" in Appellant's trial in the Federal Court (R. 70). The State policy therefore differs from the Federal policy and the Regents' Committee on Discipline recognized that it was questionable whether a person in Appellant's position could have been convicted in New York for contempt of the State Legislature (R. 47), particularly since the secretary of the organization who did have possession was convicted for failure to produce the same records and further because Appellant and the others who were indicted and who did not have possession or control, were acquitted of conspiracy not to produce the records.

"Similarity" is too amorphous a concept to serve as the basis for invoking a statute that is penal in nature. All laws have some similarities, in some aspects or degrees, no matter how utterly different in nature. Usage of this concept would tend to equate laws of various jurisdictions though the public policies they purported to express, were antithetical. The "similarity" concept has been rejected where raised. *Ex Parte Briggs*, 52 Oregon 433; *People v. Martin*, 183 Misc. 790, aff'd 268 App. Div. 1077.

Not only have the New York courts heretofore without exception followed the policy and interpretation mentioned in the authorities cited in the dissenting opinion, but as a consequence they have uniformly applied the rule against imposing domestic punishment or disqualification for federal or foreign offenses because of the "considerations which have

been thought to preclude the enforcement of the penal laws of one state in the courts of another" (*Milwaukee County v. White*, 296 U. S. 268, 275), and because "one governmental authority will not enforce penalties for the violation of the criminal laws of another" (*Matter of Cohen*, 164 Misc. 98, aff'd 254 App. Div. 571, aff'd 278 N. Y. 584. *The Antelope*, 10 Wheat. 66, 123. *Logan v. U. S.*, 144 U. S. 263, 303. *O'Brien v. Neubert*, 3 Dem. (N. Y.) 161. *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 102. *Sims v. Sims*, 75 N. Y. 466. *U. S. v. Lathrop*, 17 Johns. (N. Y.) 4, 7. *People v. Jennings*, 248 N. Y. 46, 52. *People v. Storali*, 172 Misc. 469). "The states do not enforce the criminal laws of the United States" (*People v. Welch*, 141 N. Y. 266, 275. *People v. Cook*, 220 App. Div. 110, 115, aff'd 248 N. Y. 597. *People v. Conti*, 127 Misc. 244).

The test of "literalism" employed by the Court of Appeals is answered in the quoted excerpt from the dissenting opinion as well as by the Court of Appeals itself in *Matter of River Brand v. Latrobe*, 305 N. Y. 36, 43: "a thing which is within the letter of the statute is not within the statute unless it be within the intention of the lawmakers, but a case within the intention of a statute is within the statute, though an exact literal construction would exclude it. It is a familiar legal maxim that 'he who considers merely the letter of an instrument goes but skin deep into its meaning,' and all statutes are to be construed according to their meaning, not according to the letter."

Further, although in its extended sense the term "crime" may include misdemeanors and mean any violation of a law, nevertheless "in common usage the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." Blackstone's *Commentaries* Wendell Ed. Bk. IV, Ch. 1, p. 5. A "crime" is a "gross violation of human law, in distinction from a misdemeanor or trespass or other slight offense. \* \* \* in present usage the term is commonly applied

to grave offenses \* \* \*." Webster's New International Dictionary, 2nd Ed., Unabridged, Vol. 1, pp. 625-6. The term crime is "commonly used only of grave offenses." The Oxford New English Dictionary, Vol. II, p. 1172. A crime is "A grave offense against morality or social order." Funk & Wagnalls New Standard Dictionary, Medallion Ed. p. 614. "In a general sense the word 'crime' might mean any offense of a deep and more atrocious nature as distinguished from smaller offenses known as misdemeanors." *State v. Johnson*, 202 La. 926, 930-1. *State v. Scott*, 24 Vt. 127, 130. Where an insurance policy was to be void if the assured's death was caused by his "criminal violation of law" and his death was caused by violations of the traffic law which were "misdemeanors \* \* \* and therefore in the technical legal sense, a crime," nevertheless the Court reviewed the distinction between "crime" and "misdemeanor", and held that "the layman would receive the impression if he did not already have it" that a crime "implies a wicked or heinous act" and to hold otherwise is "to ignore the common usage of the term." *Van Riper v. Constitutional Government League*, 1 Wash. 2d 635, 639.

Since the Court of Appeals agreed that the act of which Appellant had been convicted was devoid even of moral turpitude (R. 67), it does not fall within the ordinarily accepted meaning of "crime" and the statute should not have been applied to that offense. In any event, the undefined term "crime" in Section 6514(2b) is vague and set forth no standard for the Regents, namely whether the Regents are to use the definition of any violation of any law or the commonly accepted definition, namely an offense of a more atrocious dye as distinguished from a misdemeanor. Further, are the Regents to use New York standards of whether the act is a crime or a misdemeanor (even though the act is no offense at all in New York), or the standards of the foreign country or other foreign convicting jurisdiction? And what if the act is no crime but is "meritorious" in New York? What if in the foreign convicting jurisdiction only grave offenses are

crimes, and the offense is slight there but grave here, and vice versa?

The right to practice medicine is a valuable right to liberty and property, and "the right to continue" in any "lawful \* \* \* profession \* \* \* cannot be arbitrarily taken any more than \* \* \* real or personal property can thus be taken." *Dent v. West Virginia*, 129 U. S. 114, 121-2. *Smith v. Texas*, 233 U. S. 630, 636.

Because discipline "partakes of the nature of punishment" the statutes "must be strictly construed." *Matter of Donegan*, 282 N. Y. 285, 292. Cases involving such discipline, involve, as the Court of Appeals mentioned, "the imposition of stringent additional penalties" (R. 66). Because of the "grave nature" of the punishment, and the fact that a "penalty" is involved, and because violation of the medical statute is the first step toward a crime since practice after suspension is a misdemeanor, such statutes are examined by the application of the vagueness doctrine. *Jordan v. De-George*, 341 U. S. 223, 231; *Small v. American*, 267 U. S. 231, 239.

"The crime 'must be defined with appropriate definiteness.' \* \* \* Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act \* \* \*." *Winters v. New York*, 333 U. S. 507, 515. What is invalid, is "the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin v. Commission*, 286 U. S. 210, 243.

To compel New York physicians to "live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place," as Judge Fuld noted (R. 79), does not delimit the application of the term "crime" but "leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89.

As the dissenting opinion concluded: "The fact that 'crime' has been committed *somewhere*, is too vague, too capricious, too unrelated to anything a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation \* \* \* that may destroy a person professionally, that may result in the loss of all that makes life worth living" (R. 79).

It is unreasonable to attribute to New York physicians a reasonable expectation that conviction of any type of offense "anywhere" in the world, that is not a crime in New York, that may be "even meritorious" in New York, that is not related to the practice of medicine, endangers their New York medical licenses, nor did any judicial opinion heretofore rendered ever charge them with such knowledge. Such a statute hardly falls within the "fair notice" precept, *Winters v. New York*, 333 U. S. 507, 524. It makes a New York medical license hostage to the morals, policies and laws of the rest of the world, known or unknown.

"No one may be required at peril of life, liberty or property, to speculate as to the meaning of penal statutes. \* \* \* 'a statute \* \* \* so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Lanzetta v. New Jersey*, 306 U. S. 451, 453. "Before a man can be punished, his case must be plainly and unmistakably within the statute." *U. S. v. Brewer*, 139 U. S. 278, 288.

Further, Appellant was testing constitutionality in his "test case" in the Federal Court in the District of Columbia. On the appeal from his conviction, one Judge agreed with Appellant's contentions as to constitutionality (*Barsky v. U. S.*, 167 F. 2d 241). A statute so vague, unlimited and conflicting in form and as interpreted, as in addition to permit within the scope of its language a prohibition against "seeking judicial construction" and testing of new constitutional issues upon pain and penalty of loss of a medical license on top of the jail punishment and actual suspension

exacted and paid for the constitutional test, is void, oppressive and repugnant to the equal protection and due process precepts. As the Court held in *Ex Parte Young*, 209 U. S. 123, 146, 147: "when the penalties \* \* \* are \* \* \* so severe as to intimidate \* \* \* from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited \* \* \* seeking judicial construction of laws which deeply affect \* \* \* rights." *Wadley v. Georgia*, 235 U. S. 651, 662, *et seq.*

If a physician cannot invoke his right to test legislative acts without the fear of losing his livelihood in addition to the sentence served for the test, he loses the rights of a citizen. The physician becomes a cowed vassal of the state. The law becomes a bill of attainder directed against physicians who would test the constitutionality of legislation or acts in pursuance thereof. It violates first and fundamental principles.

To construe Sections 6514(1) and 7210(1) of the Education Law, as well as the disbarment statutes, so that the licenses of a physician guilty of a federal felony involving narcotics, and an engineer guilty of a federal felony involving a conspiracy to defraud the United States, and a lawyer guilty of a federal felony involving a mail fraud, are not revoked or suspended, and yet to hold that Appellant's license may be suspended or even revoked on conviction of a lesser federal offense that is not a crime in New York and that involves neither moral turpitude nor intellectual unfitness, promotes "irrational discrimination" (*Goessart v. Cleary*, 335 U. S. 464, 466) and offends the traditional concepts of "fair play and substantial justice." *Milliken v. Meyer*, 311 U. S. 457, 463. *McDonald v. Mabee*, 243 U. S. 90, 91.

To answer all these contentions as the Court of Appeals did, that the type of crimes the Regents will select for discipline, must be left to their "good sense and judgment" (R. 67), condones legislative abdication without standards and points up the invalidity of the statute. As Judge Fuld

stated: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action" (R. 79). The statute, "in the absence of narrowly drawn reasonable and definite standards for the officials to follow must be invalid. \* \* \* No standards appear anywhere; no narrowly drawn limitations, no circumscribing of absolute power; \* \* \*. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here." *Niemotko v. Maryland*, 340 U. S. 268, 271.

To hold that the crimes intended to be punished in Section 6514(2b) are those to be selected by the "good sense and judgment" of the Regents, "would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to public interest when unjust and unreasonable in the estimation of the court and jury." *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89. In fact acts chosen for discipline by the "good sense and judgment of our Board of Regents" (R. 67) are not even limited by the requirement that they be "detrimental to public interest when unjust and unreasonable."

"It is obvious that this is no narrowly drawn statute. \* \* \* it would seem to be warrant for conviction for agreement to do almost anything which a judge or jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." *Musser v. Utah*, 333 U. S. 95, 96-7. A statute which, as interpreted and applied, leaves these matters to an administrative board's "good sense and judgment", is even broader than those described above.

As the dissent stated, the test of "good sense and judgment" also overlooks the precept that "a statute's validity must be judged \* \* \* 'by what is possible under it'" (R. 75).

The very purpose of the Constitution was to substitute the command of the law for the "good sense and judgment" of men in matters touching the fundamental rights of life, liberty and property. It does not save the constitutionality

of the law to say that perhaps the Regents will not revoke or suspend a license on some insubstantial ground. It is sufficient to condemn the law that it "authorizes" the Regents to do so, because "it is in this light that the validity of the statute must be determined." *Bailey v. Alabama*, 219 U. S. 219, 235.

## POINT II.

The statutes on their face and as construed and applied violate the due process clause of the Fourteenth Amendment and the constitutional prohibition against double jeopardy and double punishment by predicating the suspension or revocation of a New York medical license upon the extra-territorial conviction of an act that involves neither moral turpitude nor intellectual unfitness, that is not related to the practice of medicine or to the welfare of the citizenry of New York.

The Court of Appeals fixed the meaning of the statutes here so that a New York physician convicted outside of New York of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine, may nevertheless have his license revoked or suspended. The Court based its decision on the ground that "The Legislature knows how to state such limitations when it so desires \* \* \*" (R. 67). Judge Fuld, however, stated:

"In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair v. United States*, supra, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients." (R. 72)

\* \* \* \* \*

"It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent or dishonest practitioners of medicine or of plumbing is, of course, for the Legislature to decide. But there can be no gainsaying the fact that the Legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos v. United States District Court*, 19 F. 2d 722.)" (R. 78)

Appellant served a prison sentence and an actual suspension for those five months from his medical practice. He now faces the additional punishment of an additional six months' suspension of his practice by reason of that conviction which the Court of Appeals agreed involved no moral turpitude: "see, as to there being no moral turpitude in this offense, *Sinclair v. U. S.*, 279 U. S. 263, 299" (R. 56).

In *Liggett v. Baldridge* (278 U. S. 105, 111-113), this Court held:

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

"\* \* \* A state cannot 'under the guise of protecting the public, arbitrarily interfere with \* \* \* lawful oe-

cupations or impose unreasonable and unnecessary restrictions \* \* \*,”

*California Reduction v. Sanitary*, 199 U. S. 306, 318; *New State Ice Co. v. Liebmann*, 285 U. S. 262, 278.

“The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have some appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.” *Herndon v. Lowry*, 301 U. S. 242, 258.

If the statute “purported to confer arbitrary discretion to withhold a license or to impose conditions which have no relation to the applicant’s qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment.” *Douglas v. Noble*, 261 U. S. 165, 168. The N. Y. Court of Appeals itself held elsewhere that the medical statutes of New York “are designed to protect the people from the ministrations of incompetent, incapable and ignorant persons, and to avoid the consequent harm to their health and physical well-being.” *People v. Laman*, 277 N. Y. 368, 381.

Conviction of a foreign offense that New York itself has not declared in its Penal Law or elsewhere to be violative of the general welfare of the people of New York, should not enable an administrative agency of New York to suspend a medical license when the sole interest of that agency is to regulate the practice of medicine in the interest of the public of New York. “If detriment to the public health \* \* \* has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced \* \* \* and none exists.” *Liggett v. Baldridge*, 278 U. S. 105, 114.

Since “the right to continue” in a profession “cannot be arbitrarily taken,” if “the conditions imposed by the state (are) for the protection of society \* \* \* for the general welfare of its people \* \* \* to secure them against the consequences of ignorance and incapacity as well as deception and fraud,” and if the regulations “are appropriate to the calling

or profession \* \* \* no objection to their validity can be raised \* \* \*. It is only when they have no relation to such calling or profession \* \* \* that they can operate to deprive one of his right to pursue a lawful vocation." *Dent v. West Virginia*, 129 U. S. 114, 121, 122.

Legislation requiring the taking of an oath that the individual was not guilty of specified acts, in order to be permitted to continue in his profession, was declared invalid because "the acts \* \* \* have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military service \* \* \* and his fitness to teach the doctrines or administer the sacraments of his church \* \* \*. It is manifest upon a simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition for allowing the exercise of the professions and pursuits." *Cummings v. Missouri*, 4 Wall. 277, 319, 320; *Ex Parte Garland*, 4 Wall. 333, 377, 379. The *Cummings* and *Garland* cases hold that persons "cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions." *Dent v. West Virginia*, 129 U. S. 114, 128.

The N. Y. Court of Appeals itself held elsewhere that a liquor license should be revoked only where "the violations were of such a character and were so closely identified in time and circumstances with the business under regulation that we may not say that the revocation was without authority or in any way an abuse of regulatory power." *Matter of Colonial Liquor Distributors v. O'Connell*, 295 N. Y. 129, 141.

An attorney might be disciplined "if convicted of a misdemeanor which imports fraud or dishonesty." *Ex Parte Wall*, 107 U. S. 265, 273. Assuming, arguendo, that disci-

pline could or should be predicated on moral turpitude, surely discipline requires at least the presence of moral turpitude. "The presence of moral turpitude has been used as a test in a variety of situations including legislation governing the disbarment of attorneys and the revocation of medical licenses." *Jordan v. DeGeorge*, 341 U. S. 223, 227. And even in the *Jordan* case, "Mr. Justice Black, Mr. Justice Frankfurter and I [Mr. Justice Jackson] cannot agree, because we believe the phrase 'crime involving moral turpitude' \* \* \* has no sufficiently definite meaning to be a constitutional standard for deportation" (341 U. S. at 232).

In the admitted absence of even moral turpitude, the suspension or revocation of a medical license because of a physician's conviction of what is deemed a misdemeanor in a jurisdiction foreign to New York, is additional punishment for the same offense. The N. Y. Court of Appeals itself recognized this elsewhere when it held: "Denial or revocation of a license because of guilt of an offense which tends to show moral or intellectual unfitness does not constitute punishment for this offense \* \* \*. It is only a measure of protection to the public." *Mandel v. Regents*, 250 N. Y. 173. So that suspension for an offense which does not show "moral or intellectual unfitness" is double punishment.

"The disabilities created \* \* \* must be regarded as penalties—they constitute punishment." *Cummings v. Missouri*, 4 Wall. 277, 320; *Ex Parte Garland*, 4 Wall. 333, 377, 379; *United States v. La Franca*, 282 U. S. 568, 575. The Court of Appeals stated here that Section 6514 "empowers the Regents to impose a penalty" and that the statute is "stringent" (R. 68).

But Appellant was punished once. He served a jail sentence in Virginia, hundreds of miles from his wife and child, where he was permitted two visiting hours a month (S.M. p. 247). He also suffered an actual suspension of his medical license for those five months. To punish him again by still another suspension of his medical license for an extra-territorial offense devoid of moral turpitude, unrelated to his

profession, unrelated to the regulation of medical practice in the public interest, is double punishment for the same offense. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense," and "no narrow or illiberal construction should be given" to this precept. *Ex Parte Lange*, 18 Wallace 85 U. S. 163, 168, 178. *Coy v. U. S.*, 156 F. 2d 293, 295. Constitution of New York, Article 1, Section 6, in McKinney's Consol. Laws of N. Y., Vol. 2, page 95.

As Judge Fuld noted here:

"For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex Parte Garland*, 4 Wall. (U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this court, prevent any other conclusion." (R. 79)

The Court of Appeals cited only *Hawker v. New York*, 170 U. S. 189, 196, to the effect that "the commission of crime, the violation of the penal laws of a State, has some relation to the question of character." But the *Hawker* case bears out Appellant's contentions: (a) The crime involved there was a felony, not a misdemeanor. "In *Hawker v. New York* \*\*\* the Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony." *Garner v. Los Angeles Board*, 341 U. S. 716, 722. Plainly, therefore, when this Court spoke of "crime" and its relationship "to the question of character," it was speaking of a felony or an offense of a grave nature. Surely the Regents will not contend this Court meant that every offense, including those illustrations mentioned by Judge Fuld in his dissent (R. 75), reflect adversely on character. It does not seem

necessary to adduce numerous additional illustrations of offenses in foreign countries or in the states that are misdemeanors but do not reflect adversely on character. (b) The crime there involved the performance of abortions and was therefore directly connected with the practice of medicine, unlike the case at bar. (c) The conviction there was a conviction in New York and of an act that was made a felony by the laws of New York, again unlike the situation at bar. Accordingly, this Court pointed out, at page 196, that "When the Legislature decides that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule," especially since it involves "a conviction duly had in one of the courts of the State," and because in so acting it is seeking "to protect its citizens." Accordingly, this Court held that it was not unconstitutional to deny admission to practice to one whose requisite character was lacking in that he had been convicted in New York of a New York felony in connection with the New York medical practice. Even then, three of the Justices dissented.

On the contrary, in the situation at bar there is ample support for the feeling that the offense of which Appellant had been convicted reflects well on his professional standing. As a physician who had nothing to gain, he refused to breach the confidence and trust reposed in the organization and in him, under the pain and penalty of an actual jail sentence and an actual suspension of his medical license, to avoid harm, imprisonment and possible death to the families of those persons who were still in Spain. Small wonder then that prominent persons in many professions appealed to the Regents on behalf of the Appellant (S.M. pp. 423-450). As Dr. Albert Einstein concluded:

"My opinion is that your attitude in the case of the Joint Anti-Fascist Refugee Committee was the only one a man of moral responsibility could have taken. I am sure that I myself would have acted in precisely the same way." (S.M. p. 434)

Small wonder that Judge Fuld noted:

"the present decision has an importance that transcends and reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me." (R. 76)

### POINT III.

**The Court of Appeals refused to interfere despite the fact that the determination was predicated upon the listing and despite the Regents' disregard of the reversal in the listing case by this Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. The result was a violation of the constitutional precept against legislative abdication, and this admittedly "gross and prejudicial error" deprived Appellant of a genuine or judicial hearing and of his liberty and property without due process.**

The Court of Appeals refused to interfere even though admittedly the Regents "ignored weighty considerations and acted on matters not proper for consideration" (R. 68). Section 6515(5) requires that a determination be based upon "legal evidence."

In the hearing before the Sub-Committee of the Medical Committee on Grievances, the Attorney General of New York, over objection, repeatedly adverted to the fact, in page after page of testimony, that the organization had been placed on the U. S. Attorney General's list (S.M. pp. 394-402). (It had not been on the list for the years prior to or even at the time of Appellant's indictment or conviction, but was first "listed" some eight months after the indictment.) The Attorney General of New York also adduced testimony over objection, that the complaint of the organization against the U. S. Attorney General in connection with that listing had been dismissed by the District Court and that the dismissal had been affirmed by the U. S. Court of Appeals (S.M. p.

399). The Sub-Committee of the Medical Committee on Grievances and the entire Medical Grievance Committee predicated their decision to suspend Appellant's license, if not completely at least in part, upon that listing (R. 33). But subsequently this Court reversed. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. Plainly the reference to the listing constituted, as Judge Fuld noted, "gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.)" (R. 77). *United States v. Remington*, 191 F. 2d 246, 252.

Despite the reversal by this Court noted in the subsequent report of the Regents' Committee on Discipline (R. 56), the Regents simply disregarded the report and recommendation of its own Committee on Discipline, disregarded the reversal by this Court, and upheld the determination and recommendation of the Medical Committee on Grievances in imposing this six months' suspension. But since that determination occurred prior to the reversal by this Court and since that determination was predicated on this illegal evidence, the suspension was not based on the "legal evidence" mentioned in Section 6515(5). Despite this undisputed, patent, gross and prejudicial error, the Court of Appeals not only refused to review the Regents' determination as to guilt but also held that "we are wholly without jurisdiction" to review the measure of punishment (R. 68).

There is nothing in the record or findings to indicate that the error complained of was committed only in connection with the measure of discipline or punishment. The error was committed during the hearing at which the guilt or innocence of the Appellant was to be determined, and not during any special or separate hearing held subsequent to a finding of guilty and relating solely to the measure of punishment. There is nothing in the record to indicate that the Regents related this illegal evidence solely to punishment. The cases cited by the Court of Appeals are therefore not in point. For example, the Court of Appeals cited *Williams v. New York*, 337 U. S. 241, 246, where the issue involved mat-

ters before a sentencing Judge. But the hearing at bar was not such a hearing. Secondly, the evidence complained of was doubly illegal in that the organization had not been listed for the year prior to or even at the time of Appellant's indictment or conviction. It was listed only some eight months after the indictment, and Appellant resigned from the organization while he was imprisoned and about a year prior to the hearing before the Regents (S.M. p. 367).

The significance of the "listing" is demonstrated by what occurred at the hearing. Since the operations of the organization and the motives of the Appellant were not material in the criminal trial (R. 48, 50, 70), Appellant, at the hearing before the Sub-Committee of the Medical Grievance Committee, offered voluminous, uncontradicted and documented proof of the workings of the organization and of Appellant's role and motives, all of which "are material here" as the Regents' Committee on Discipline stated (R. 53). There then came a point when the three members of this Sub-Committee declared themselves unequivocally convinced that the organization was a genuine relief organization devoted to the cause claimed:

"Dr. Ayers: Mr. Fishbein, may I speak individually for the committee. We have appreciated immensely all this evidence that you have brought here and all the evidence that has been brought out here \* \* \* the amount of money given for a cause, who it went to, the bank account substantiating it, the licensing by the committee which you mentioned. I can say for myself that it is beautifully given, but if you had one hundred more samples of them to offer, we couldn't believe it any more than we already do. You have offered splendid evidence here of what you are trying to do. One other article wouldn't enhance our belief in this." (S.M. p. 285)

Finally Appellant offered to introduce in evidence a motion picture narrated by Quentin Reynolds that would run only some 20 minutes and would furnish visual proof of the activities of the organization. Appellant had a projectionist and a screen at the hearing. The chairman stated:

"Chairman Shearer: Mr. Fishbein, you have been very zealous and very able and you have given us such a beautiful picture of the workings of this organization, that it requires nothing more like a movie or anything else. To show us anything more would be accumulative and unnecessary. The entire committee feels the same way and the objection is sustained." (S.M. p. 375)

Despite these repeated assertions that they were convinced, they predicated their decision upon conjecture instead of proof. Their attitude was summarized by the Regents' Committee on Discipline:

"conjecture cannot take the place of evidence."

\* \* \* \* \*

"We disagree with the Attorney General's position, stated here and elsewhere and reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced." (R. 56, 59)

On the one hand the Sub-Committee of the Medical Committee on Grievances stated they were so convinced, they would accept no further proof; on the other hand, they disciplined Appellant on the conjecture "that facts not shown by evidence to have existed might have been disclosed had the

records been produced." Lacking this proof, the Sub-Committee relied on the listing (R. 33). The full Medical Committee on Grievances accepted their report and imposed the six months' suspension, by a close vote (R. 34). Thereafter the Regents, disregarding the report of their own Committee on Discipline, voted to accept the determination of the Medical Committee on Grievances, and confirmed the six months' suspension. Plainly, the listing was the primary if not the sole basis of the determination.

It is only realism to recognize that this listing and the dismissal of the organization's complaint in the courts below this Court, undoubtedly furnished the *raison d'etre* of this entire proceeding against Appellant. Had it been another organization, it is fair to assume that nothing would have happened. In any event, a hearing at which evidence of the listing plus evidence of dismissal of the organization's complaint plus evidence of the affirmance of the dismissal may be adduced and used in the findings, but in which the Regents may disregard the reversal by this Court, is a hearing not supported by legal evidence, a hearing involving the application of an erroneous and reversed principle of law, and not a fair hearing.

The refusal of the Court of Appeals to review despite the fact that this error is not disputed, deprived Appellant of the guarantee of due process. As Judge Fuld stated:

"After noting that the courts would ultimately have to decide whether appellant's crime was one contemplated by the statute, the Regents' Committee turned to the subject of discipline and wrote that there was no basis in the facts presented for any punishment greater than censure and reprimand:

"While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline, beyond the statutory minimum of censure and reprimand must,

we believe, be based either on the inherent nature of the respondent's violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline.'

"And it ended its report in this way:

"'Since violation of the Federal statute which \*\*\* [appellant] has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of \*\*\* [appellant's] explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that \*\*\* [appellant's] license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded.'

"The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances \*\*\*."<sup>3</sup> (R. 76)

"In the course of its opinion, the court has written (Opinion p. 6):

"'As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for*

<sup>3</sup> While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that 'Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States.' Reliance upon that fact, was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.)"

*consideration, it is enough to say we are wholly without jurisdiction to review such questions.'* (Emphasis supplied.)

"However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits." (R. 78)

As was held in *Ng Fung Ho v. White*, 259 U. S. 276, 284:

"Courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow v. United States*, 208 U. S. 8; or the finding was not supported by evidence; *American School of Magnetic Healing v. McAnulty*, 187 U. S. 94, or there was an application of an erroneous rule of law. \* \* \* It (deportation) may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction offered by judicial proceedings, the Fifth Amendment affords protection in its guaranty of due process of law."

The refusal of the Court of Appeals to intervene despite the undenied "gross and prejudicial error," the admission of the illegal evidence at the hearing, and the disregard of the reversal of the "listing" case by this Court, violates the due process concept and offends the "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U. S. 457, 463; *McDonald v. Mabee*, 243 U. S. 90, 91; *International Shoe Co. v. Washington*, 326 U. S. 310, 316; *Travelers Health Ass'n v. Virginia*, 339 U. S. 643.

## POINT IV.

The statutes on their face and as construed and applied, violate the constitutional precept against legislative abdication, without guide-posts or standards, in connection with the crimes to be selected by the Regents for discipline, the measure of punishment to be imposed, the hearings, and the evidence, and deprived Appellant of a genuine and judicial hearing, and of his liberty and property without due process.

(a) As to the crimes to be selected for discipline, the Court of Appeals held here that the Regents have unlimited power to revoke the license of a New York physician who has been convicted of any crime, "anywhere" in the world, and even though the act is meritorious in New York (R. 67, 75, 79).

As Judge Fuld noted in his dissent:

"In enacting the provision under consideration, it is, of course, obvious that the Legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries \* \* \* and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts \* \* \* and I cull from the Court's opinion (p. 4)—'in some other state (or country) \* \* \* which we in New York consider non-criminal, or even meritorious.' " (R. 74)

The Court of Appeals stated plainly that there are no standards or limitations to guide the Regents in the crimes they may choose to discipline, except the "good sense and judgment of our Board of Regents" (R. 67). In the meantime, as Judge Fuld pointed out, physicians must "live under the constant fear that they may be deprived of their right to practice if they offend ainst *any* law, *any* place" (R. 79).

The fear is constant because no time limit is involved and what is "good sense and judgment" on the part of one Board of Regents may change with changing times or subsequent Boards. As the dissent pointed out: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action" (R. 79).

In Point I it was urged that "good sense and judgment" was too indefinite and unlimited to serve as a constitutional standard for revocation or suspension of a medical license. Repetition here is unnecessary except to point out that the same arguments and authorities mentioned there are applicable in connection with this point, namely the constitutional prohibition against legislative abdication, without standards or guide-posts, as to the crimes to be the basis for disciplinary action against a physician. As this Court held in *United States v. Reese*, 92 U. S. 214, 221:

"It would certainly be dangerous if the legislature could set a net large enough to call all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

If the courts are thus delimited, certainly an administrative board should be, especially when its admitted function is to regulate the practice of medicine to protect the public and not to add punishment to punishment. To endow the Regents with this "net large enough to catch all possible offenders," to permit them to use their particular brand of "good sense and judgment" in selecting the offenders they may want to punish, to permit them to employ their office as a cloak to inflict additional punishment on physicians for matters unconnected with the medical practice, is to open up vast fields of political and related ramifications whose consequences need no belaboring. The law would become a

dangerous weapon in the hands of the Regents, and the physician a second class citizen. It is unconstitutional "to leave room for the play and action of purely personal and arbitrary power. \* \* \* For the very idea that one may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U. S. 356, 369. "The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law." *Youngstown v. Sawyer*, 343 U. S. 579, 654.

(b) There is also complete legislative abdication with respect to the punishment to be imposed. In the N. Y. Penal Law, like the federal criminal code and the penal laws of other jurisdictions, the Legislature defined the various crimes, defined the degrees of the crimes, and fixed appropriate ranges of punishment to fit the particular crimes involved. Such guide-posts and standards are utterly lacking here. In fact here the Regents have unlimited discretion to reverse the legislative intent indicated in the penal law. The statutes in question merely state that the Regents may impose any discipline ranging from censure through revocation, but there is no guide-post or standard as to which crimes draw what punishments. On the one hand the Regents thus have the power to revoke a medical license for an extra-territorial offense that is "even meritorious" in New York and that involves no moral turpitude or intellectual unfitness. On the other hand the Regents may impose a mere censure upon a physician who commits a serious crime directly connected with his medical practice. What is more, the Court of Appeals stated here that the courts are "wholly without jurisdiction" to interfere with the measure of punishment visited by the Regents upon a New York physician, and this even though the Regents may have "ignored weighty considerations and acted on matters not proper for consideration" (R. 68). The Regents are therefore declared to be utterly im-

mune by statute and by judicial declaration. As Judge Fuld stated:

"However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits." (R. 78)

As the dissenting opinion concluded, such unlimited power and unfettered discretion "as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the Legislature" (R. 78), and is "not merely delegation run riot but legislative abdication," and "violates first principles" (R. 79). These statements are particularly apposite in view of the report of the Regents' own Committee on Discipline that "we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand" (R. 59).

If the Regents' power is so unfettered and unlimited that it can disregard the evidence, disregard the "gross and prejudicial error" mentioned, disregard its own Committee's report, disregard the reversal by this Court in the "listing" case, and if such arbitrary and capricious power, "unsupportable on rational grounds," cannot even be reviewed judicially, then truly what is involved is "legislative abdication" that "violates first principles" and offends the "traditional notions of fair play and substantial justice." State action must "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'land of the land'." *Hebert v. Louisiana*, 272 U. S. 312, 316.

As was pointed out in the rate-making cases like *Ex Parte Young*, 209 U. S. 123, 147:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of rates, this court has held such a law to be unconstitutional. Chicago, etc. Railway Co. v. Minnesota, 134 U. S. 418."

We find it difficult to perceive why review should not have been similarly sanctioned here. Absent that power of review, it is submitted that the law is unconstitutional.

(c) There is ambiguity and contradiction, without standards or guide-posts, as to the purpose of the "hearing" mentioned in Sections 6514(2) and 6515(4). The Court of Appeals held here that the hearing is solely for the purpose of adducing testimony reflecting upon the punishment, because, "Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties" (R. 68), but this testimony "could not change the admitted fact of their conviction" (R. 65). The Court of Appeals thus held that as far as this Appellant is concerned, the hearing before the Regents was a hearing before a "sentencing judge" and not a hearing to determine his actual original guilt or innocence. But Section 6515(4) states that the charges must be determined "upon their merits" and the physicians can be "found guilty" or "not guilty." Appellant had adduced voluminous testimony, utterly contradicted, to show that although he had been found guilty in the criminal trial which had been limited to the constitutional issues, he was not actually guilty. The Regents' own Committee on Discipline understood it to be its function and duty to delve into the evidence to determine guilt or innocence, as indicated

by its statement that the evidence summarized at the outset of this brief was not material in the criminal trial but it is "material here" (R. 53). Having received the evidence, it concluded "Our examination of the record discloses no such basis \* \* \* for concluding that these views and assertions were not honestly held and made," and they "sufficiently explain the refusal \* \* \* to produce the \* \* \* records, that being the only method by which the legal objections \* \* \* could be judicially determined and the traditional method \* \* \*" (R. 57, 58).

The holding of the Court of Appeals here is in direct conflict with the wording of the statute, with the concept of the hearing held by the Regents' Committee on Discipline, and also with its holding in *Matter of Donegan*, 265 App. Div. 774, aff'd 294 N. Y. 704, where the Court, mindful of the holding in *Matter of Donegan*, 282 N. Y. 285, that the foreign conviction is only a "prima facie finding of guilt," sanctioned the use of the hearing to establish innocence despite a prior conviction. There, an attorney had been convicted of a mail fraud in the Federal Court in New York, by a Court and jury. The conviction was affirmed by the U. S. Court of Appeals. Nevertheless when he was brought up in disbarment proceedings, it was held that the Board had the right to re-examine the question of innocence or guilt. Thereafter he was found to have been innocent despite the fact that the Federal Court and jury had found him guilty. The recommendation against disbarment was upheld by the Court of Appeals. The Court of Appeals at bar has plainly adopted a conflicting and discriminatory procedure.

The Regents are therefore apparently to have unlimited power and discretion to declare that on some occasions hearings will be limited to establishing the conviction and the taking of testimony will merely be for purposes of fixing the punishment; that on other occasions, the hearing will be used as an independent search into the physician's original guilt or innocence. At no time was Appellant informed that this was the purpose of the hearing, nor could he or his attorney

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We find it difficult to perceive why review should not have been similarly sanctioned here. Absent that power of review, it is submitted that the law is unconstitutional.

(c) There is ambiguity and contradiction, without standards or guide-posts, as to the purpose of the "hearing" mentioned in Sections 6514(2) and 6515(4). The Court of Appeals held here that the hearing is solely for the purpose of adducing testimony reflecting upon the punishment, because, "Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties" (R. 68), but this testimony "could not change the admitted fact of their conviction" (R. 65). The Court of Appeals thus held that as far as this Appellant is concerned, the hearing before the Regents was a hearing before a "sentencing judge" and not a hearing to determine his actual original guilt or innocence. But Section 6515(4) states that the charges must be determined "upon their merits" and the physicians can be "found guilty" or "not guilty." Appellant had adduced voluminous testimony, utterly contradicted, to show that although he had been found guilty in the criminal trial which had been limited to the constitutional issues, he was not actually guilty. The Regents' own Committee on Discipline understood it to be its function and duty to delve into the evidence to determine guilt or innocence, as indicated

by its statement that the evidence summarized at the outset of this brief was not material in the criminal trial but it is "material here" (R. 53). Having received the evidence, it concluded "Our examination of the record discloses no such basis \* \* \* for concluding that these views and assertions were not honestly held and made," and they "sufficiently explain the refusal \* \* \* to produce the \* \* \* records, that being the only method by which the legal objections \* \* \* could be judicially determined and the traditional method \* \* \*" (R. 57, 58).

The holding of the Court of Appeals here is in direct conflict with the wording of the statute, with the concept of the hearing held by the Regents' Committee on Discipline, and also with its holding in *Matter of Donegan*, 265 App. Div. 774, aff'd 294 N. Y. 704, where the Court, mindful of the holding in *Matter of Donegan*, 282 N. Y. 285, that the foreign conviction is only a "prima facie finding of guilt," sanctioned the use of the hearing to establish innocence despite a prior conviction. There, an attorney had been convicted of a mail fraud in the Federal Court in New York, by a Court and jury. The conviction was affirmed by the U. S. Court of Appeals. Nevertheless when he was brought up in disbarment proceedings, it was held that the Board had the right to re-examine the question of innocence or guilt. Thereafter he was found to have been innocent despite the fact that the Federal Court and jury had found him guilty. The recommendation against disbarment was upheld by the Court of Appeals. The Court of Appeals at bar has plainly adopted a conflicting and discriminatory procedure.

The Regents are therefore apparently to have unlimited power and discretion to declare that on some occasions hearings will be limited to establishing the conviction and the taking of testimony will merely be for purposes of fixing the punishment; that on other occasions, the hearing will be used as an independent search into the physician's original guilt or innocence. At no time was Appellant informed that this was the purpose of the hearing, nor could he or his attorney

have reasonably reached that conclusion from the statutes from any prior judicial decision, from the Regents' Sub Committee of the Medical Committee on Grievances or from the Regents' Committee on Discipline.

Such "hearings" at the discretion of the Regents, sanctioned by the Court of Appeals, are no real hearings. They guarantee the physician just one thing: that the Regents will use their limitless discretion as they see fit, their "good sense and judgment," and no court will interfere.

Further, Section 6514 is not limited to discipline predicated upon convictions of crimes. Exclusive of subdivision 2b, all the other subdivisions refer to matters that must of necessity be examined in a genuine hearing; they cannot be established as readily as a prior conviction. Therefore the hearings provided for in Section 6515 must of plain necessity involve hearings on all the facts and merits. There is nothing in Section 6515 that can possibly serve as the basis for a restricted hearing, limited in the manner the Court of Appeals here sanctions, when subdivision 2b of Section 6514 is involved. So to delimit the hearing, to disregard the evidence adduced on that hearing bearing on the physician's original guilt or innocence, is to deprive Appellant of a real hearing.

That the Court of Appeals intended to treat the role of the Regents here as that of a "sentencing judge," is confirmed by that Court's citation of *Williams v. New York*, 337 U. S. 241, 246, *et seq.* A hearing before a "sentencing judge" on an application to revoke a medical license, is no hearing at all. To sanction a total disregard of the evidence as far as original guilt or innocence is concerned, to suspend Appellant's license despite the detailed report of the Regents' own Committee on Discipline and the evidence, and without hearing any of the witnesses or attorneys, is to deprive Appellant of a genuine and a judicial hearing and of his liberty and property without due process, *Ng Fung Ho v. White*, 259 U. S. 276, 284, and to offend "the traditional notions of fair play and substantial justice."

There is, therefore, uncontrolled delegation of power to the Regents as to the crimes they may select for discipline, the evidence they may receive, the type of hearings they may conduct, namely either true hearings or hearings before a "sentencing judge," and also uncontrolled delegation as to the punishment they may inflict. The exercise of the Regents' discretion, pursuant to that delegation, was held by the Court of Appeals here to be non-reviewable. As the dissenting opinion stated:

"Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small v. Moss*, 279 N. Y. 288, 299, we declared that 'The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,' and in *Packer Collegiate Inst. v. University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we stated that 'there must be a clearly delimited field of action and, also standards for action therein.' (See also *Niemotko v. Maryland*, 340 U. S. 268, 273; *Matter of Fink v. Cole*, 302 N. Y. 216, 225.) The wisdom of that constitutional safeguard is highlighted by its disregard in this case." (R. 79)

Similarly:

*Field v. Clark*, 143 U. S. 649, 692;

*U. S. v. Grimaud*, 220 U. S. 506, 520;

*Panama v. Ryan*, 293 U. S. 388, 415;

*Schechter v. U. S.*, 295 U. S. 495, 537.

## POINT V.

The statutes as construed and applied, are discriminatory, arbitrary and oppressive class legislation, violative of the constitutional provision for equal protection, and constitute bills of attainder.

When New York physicians, convicted of federal felonies that are not felonies in New York, are brought up in disciplinary proceedings, they receive the benefit of the legislative definition in Section 6514(1) limiting "felonies" to those defined as such by the New York law. They also receive the benefit of the traditional policy of New York not to add additional domestic punishment for conviction of foreign offenses. The Court of Appeals here however, ruled that the word "crime" (which is held to include felonies as well as misdemeanors) in subdivision 2b of the same section, is to receive a different interpretation when applied to a New York physician convicted of what is deemed a federal misdemeanor, that is no offense in New York, and the physician will not receive the benefit of the mentioned policy. Section 6514(2b) with its meaning so fixed, thus becomes discriminatory, oppressive class legislation, arbitrarily and unjustly discriminating against physicians convicted of the lesser offense. It permits physicians, lawyers and engineers, convicted of federal felonies involving moral turpitude, to receive the benefit of the definition and the policy mentioned, while it deprives Appellant, convicted of a lesser offense, devoid even of moral turpitude, of the guarantee of equal protection. There is no basis in justice, in reason, or in relationship to the medical practice, for such discrimination. There is no real or substantial relation of any such discrimination, to the public health, safety, morals or to any other phase of the general welfare. In fact as the dissent pointed out, "the argument is far stronger for limiting the term 'crime' than for limiting the term 'felony'" (R. 74).

Further, to permit attorneys to have the benefits of the procedure mentioned in *Matter of Donegan*, 265 App. Div. 774, aff'd 294 N. Y. 704; also 282 N. Y. 285; where the New York supervisory body for attorneys was authorized to investigate the question of foreign conviction and actually found the attorney innocent despite a federal court and jury verdict of guilty and an affirmance thereof, and to deny that procedure to physicians, is again indicative of the discriminatory nature of this legislation, with its meaning so fixed, and is again indicative of the lack of equal protection.

To grant physicians full hearings in connection with all other subdivisions of Section 6514, but not in connection with subdivision 2b; to hold that the foreign conviction automatically establishes the "professional fault" so that the evidence "could not change the admitted fact of their conviction" (R. 65) even though it is uncontradicted that the criminal trial was limited to constitutional issues; to hold that all men are free to test the constitutionality of legislative acts upon payment of the penalty for the test except physicians, who in addition risk the suspension or revocation of their licenses and the loss of their life's work; to hold that the dismissal of the "listing" complaint and the affirmance thereof in the U. S. Court of Appeals may be adduced in evidence, but that the reversal by this Court may be disregarded, all point up the discriminatory, oppressive nature of this class legislation and the denial of the equal protection principle.

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered \* \* \* with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U. S. 356, 373-4.

"Class legislation discriminating against some and favoring others, is prohibited \* \* \*." *Barbier v. Connolly*, 113 U. S. 27, 32.

"Unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge." *Garner v. Los Angeles Board*, 341 U. S. 716, 725.

"The Constitution \* \* \* precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goessart v. Cleary*, 335 U. S. 464, 466.

"No reasonable basis for such a discrimination is suggested and none is perceived. This means that as so applied it is invalid, notwithstanding its validity in some different applications." *Concordia v. Illinois*, 292 U. S. 535, 545.

Particularly because of the listing of the organization, *subsequent* to Appellant's conviction, the reference to the listing in the hearing before the Regents, the reference to the dismissal and to the affirmance of the dismissal of the organization's complaint against that listing, the disregard of the later reversal by this Court, the change in the temper of the times, and the utter lack of even an attempt to controvert Appellant's testimony, the Appellant must conclude that the Regents have employed the statutes involved as a bill of attainder. "The Constitution deals with substance not shadows." *Cummings v. Missouri*, 4 Wall. 277, 325.

Because of a change in the political climate from that of hostility to the Spanish regime and a favoring of the organization, to a later hostility to the organization and a favoring of the Spanish regime, there is reason to believe the statutes were used as a bill of attainder "to impose pains and penalties for past lawful associations \* \* \*." *Wieman v. Updegraff*, 344 U. S. 183.

Because the Court of Appeals held that the evidence was rightfully disregarded and the foreign conviction itself was deemed a "professional fault," the Regents employed the statutes as a bill of attainder "to inflict punishment without a judicial trial \* \* \*," *Cummings v. Missouri*, 4 Wall. 277, 323. *Garner v. Los Angeles*, 341 U. S. 716, 722. The statutes became a bill of attainder in the hands of the Regents be-

cause the Regents, with complete legal immunity, "determines the sufficiency of the proof adduced whether conformable to the evidence or not; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense." *Cummings v. Missouri*, 4 Wall. 277, 323. The unprecedented, discriminatory action taken by the Regents and their disregard of the report of their own Committee on Discipline, point up the plain fact that their "power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." *Ex Parte Garland*, 4 Wall. 333, 379, and not to protect the public of New York against an incompetent surgeon.

#### POINT VI.

**The statutes as construed violate the precept that a state may not impose penalties for acts occurring in Washington, D. C., where the United States has exclusive jurisdiction and exclusive power of legislation, especially where it is apparent that there is no substantial relationship between the act complained of and the medical practice.**

The alleged contempt and conviction both occurred in Washington, D. C., where the United States has exclusive power of legislation and exclusive jurisdiction, and where the United States did legislate in Title 2 U. S. C. Section 192.

The statutes here which were construed so as to impose penalties for conduct in Washington, D. C., that was unconnected with the medical practice, are invalid, because "a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States," and because "the State undertakes to go beyond its jurisdiction into territory where the United States has exclusive control." *Western Union v. Brown*, 234 U. S. 542, 547.

"It is of the highest public importance that the jurisdiction of the State should be resisted at the borders of those places

where the power of exclusive legislation is vested in Congress by the Constitution. \* \* \* If it is desirable that penalties should be inflicted for a default \* \* \* occurring within the jurisdiction of the United States, Congress only has the power to establish them." *Western Union v. Chiles*, 214 U. S. 274, 278.

This principle becomes doubly important here where the default in the production of the books was deemed an offense only in Washington, D. C., and where there was no relationship between the omission complained of and the regulation of medical practice in the interests of the citizenry of New York.

#### POINT VII.

**The statutes as applied disregard Title 18 U. S. C. Section 402, a law of the United States, and thus violate Article VI of the Constitution.**

The indictment against Appellant was for "Contempt of the House of Representatives Committee" (S.M. p. 126). The Attorney General of New York stated that the conviction was for "contempt of Congress" (S.M. p. 459). The word "crime" is not mentioned in the indictment or judgment of conviction (S.M. p. 130). Title 18 U. S. C., defines "Crimes" against the United States. Section 402 thereof is headed: "Contempts constituting Crimes." The contempt of which Appellant was convicted is not mentioned there at all. At the bottom of that section the following appears: "all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." Thus, the contempt at bar is not even designated as a federal "crime". Although it is a contempt that may be "punished" according to the "prevailing usages at law," it is not listed as a federal crime and therefore the requirement of Section 6514(2b) that there be a "conviction of a crime," is missing.

The Regents failed to discharge the burden of proving the alleged contempt was a crime, by failing to resolve the doubt

to say the least, that Section 402 of Title 18 throws upon the existence of a "crime" at bar. To disregard Title 18 U. S. C., Section 402, is to disregard a law of the United States.

Further, Title 2 U. S. C., Section 192, under which Appellant was convicted, states that such a contempt "shall be deemed" a misdemeanor but since said contempt was excluded from the section on "Contempts constituting Crimes," and since such a contempt is merely "deemed" a misdemeanor for purposes of "punishment" (Title 18 U. S. C., Sec. 402), the word "deemed" must be accorded its natural meaning in its proper context as a "deeming" merely for purposes of "punishment". "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed that thing." *The Queen v. County Council of Norfolk*, 60 L. J. Q. B. (N. S.) 379, 381-2.

Although this contempt is treated for purposes of punishment as though it were a misdemeanor, it is not a "crime" because it nowhere appears in Title 18 U. S. C., Section 402, or in the indictment, as a "crime". It is one thing to make a contempt a crime as in Title 18, Section 402. Such contempts become "crimes". It is a different thing to treat a default, for the purpose of punishment, with the same effect as though it were a crime. Things equal in effect, are not identical. A heart attack and a bullet can kill; they have that effect; nevertheless they are not the same. The New York Penal Law itself, in Section 22, speaks of acts that are either "criminal or punishable."

Although the effect is the same, the failure to designate this contempt as a federal crime means that it is not a crime especially in proceedings such as these where statutes "must be strictly construed" in favor of the Appellant because they are "penal" in nature. *Matter of Donegan*, 282 N. Y. 285. In addition, there is the distinction between a "crime" and a "misdemeanor" adverted to in Point I.

## POINT VIII.

**The statutes as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and thus violate, Article I, Section 7 of the Constitution.**

There is no crime under the laws of the United States unless that crime is defined by an "Act" or a "Statute" of Congress. "One may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an Act of Congress." *Donnelly v. U. S.*, 276 U. S. 505, 511. "We agree that the courts \* \* \* in determining what constitutes an offense against the United States, must resort to the statutes of the United States enacted in pursuance of the Constitution." *Re Kollock*, 165 U. S. 526, 533. *U. S. v. Eaton*, 144 U. S. 677, 687-8.

The Constitution treats an "Act" of Congress as different from a "Joint Resolution." An "Act" reads: "Be it 'enacted' by the Senate and House" (Title 1 U. S. C., Secs. 21, 101). A "Joint Resolution" reads: "Be it resolved by the Senate and House" (Title 1 U. S. C., Secs. 22, 102). There are basic historical and legal differences resulting in a differentiation that is plainly crystallized in the Constitution (Art. I, Sec. 7 clauses 2 and 3; Art. III; Art. VI). "Law Making in the U. S." by Dr. Harvey Walker—1934 ed. p. 317.

Only "Laws" that are "enacted" as such are made part of the law of the land. Art. I, Sec. 7; Art. VI. Joint Resolutions, even though they go through the same preliminary processes, merely "take effect"; Art. I, Sec. 7; they are not included as part of the law of the land. They are used for miscellaneous matters such as extending an invitation to Lafayette to visit the United States (Dec. 6, 1824; 18th Congress, 2nd session House Journal p. 8), or to welcome Kosuth (Dec. 15, 1851; 32nd Cong. 1st session, House Journal p. 89), or to give notice of the abrogation of a treaty (April 20, 1846, 29th Cong.; House Journal pp. 695, 697).

The offense of which Appellant was convicted, embodied in Title 2 U. S. C., Section 192, is not mentioned in an "Act" of Congress but in a "Joint Resolution." 52 Statutes 942. The offense of which Appellant was convicted is therefore not a crime under an "Act" of Congress or under a "statute" of the United States. The resolution merely "took effect." Art. I, Sec. 7. "A Joint Resolution \* \* \* has the effect of law." *Watts v. U. S.*, 161 F. 2d 511; c.d. 68 S. Ct. 81. Thus, a "contempt constituting a crime" (Title 18, U. S. C., Sec. 402), and this contempt, are equal in effect only. Again, things equal in effect only, are not identical. Appellant was convicted not of a federal crime but of what was "deemed for purposes of punishment" and treated in "effect" as though it were an offense.

When this very Joint Resolution was passed, there was asked from the floor of Congress: "is it within the power and jurisdiction of the House to amend the statutory law of the United States in the form of a joint resolution and not in the form of a bill?" The answer in part was: "Strictly speaking, proposed laws should be introduced and all changes in law made through the introduction of bills. Personally I would like to see this joint resolution feature abandoned, except where it involves something which is not really fundamental law." Congressional Record, Vol. 83, p. 8171, Part 7, 75th Congress, 3rd Session.

The difference between a joint resolution, which merely expresses the sense or the will of the Congress, and a bill or Act of Congress, which becomes part of the law of the land, was pointed up in a recent discussion of a joint resolution, in the U. S. Senate on July 15, 1953, in connection with requiring certain markings on exported merchandise. Senator Potter stated:

"Frankly, I would prefer legislation requiring such marking as a mandatory provision. However, it was the sense of the committee that it would be wise merely to express the sense of Congress."

**Senator Bush asked :**

"I ask the Senator from Michigan if it might not be a good idea to have the concurrent resolution passed over, so that legislation might be prepared which would enforce the use of our markings on everything exported from this country."

\* \* \* \* \*

"Mr. Potter \* \* \* I am sure that mandatory legislation requiring such markings would be much stronger than a mere expression of Congress. If I thought there could be passed legislation \* \* \* I am sure it would be stronger than a mere expression of the will of Congress." (Congressional Record, 83rd Con. 1st Sess.; Vol. 99, No. 131, July 15, 1953, pp. 9133-4.)

The Regents claimed the foregoing contention was "unpersuasive". But the burden of being persuasive rested upon the Regents who have never attempted to explain away Title 18 U. S. C., Section 402, or the constitutional differentiation between a Law and a Joint Resolution.

Since the burden rested upon the Regents to prove that Appellant had been convicted of a crime, since crimes can only be created by Acts of Congress and not by Joint Resolutions, and since the statutes "must be strictly construed," the Regents failed to discharge the burden resting upon them.

To ignore the plain differentiation mentioned in the Constitution between a Law and a Joint Resolution, is to disregard Article I, Section 7.

#### **CONCLUSION.**

**The judgment of the Court below should be reversed.**

Respectfully submitted,

**ABRAHAM FISHBEIN,  
Attorney for Appellant.**

**APPENDIX.****NEW YORK STATE EDUCATION LAW.****Section 6514. Revocation of certificates; annulment of registrations.**

1. Whenever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony, as defined in section sixty five hundred two of this article, the registration of the person so convicted may be annulled and his license revoked by the department. It shall be the duty of the clerk of the court wherein such conviction takes places to transmit a certificate of such conviction to the department. Upon reversal of such judgment by a court having jurisdiction, the department, upon receipt of a certified copy of such judgment or order of reversal, shall vacate its order of revocation or annulment.

2. The license or registration of a practitioner of medicine may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

(a) That a physician is guilty of fraud or deceit in the practice of medicine or in his admission to the practice of medicine; or

(b) That a physician has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or

(c) That a physician is an habitual drunkard, or is or has been addicted to the use of morphine, cocaine or other drugs having similar effect, or has become insane; or

(d) That a physician offered, undertook or agreed to cure or treat disease by a secret method, procedure, treatment or medicine or that he can treat, operate and prescribe for any

human condition by a method, means or procedure which he refuses to divulge upon demand to the committee on grievances; or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio, or magazines; or

(e) That a physician did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion or to procure the performance of the same by another or to violate section eleven hundred and forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.

(f) That a physician has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including x-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, x-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equipment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment. Nothing contained in this chapter shall prohibit physicians from practicing medicine as partners nor in groups nor from pooling fees and

monies received, either by the partnerships or groups or by the individual members thereof, for professional services furnished by any individual physician, member, or employee of such partnerships or groups, nor shall the physicians constituting the partnerships or groups be prohibited from sharing, dividing or apportioning the fees and monies received by them or by the partnership or group in accordance with a partnership or other agreement; provided that a certificate of doing business under an assumed name shall have been filed pursuant to section four hundred forty or four hundred forty-b of the penal law, and provided further that no such practice as partners or in groups or pooling of fees or monies received or sharing, division or apportionment of fees shall be permitted with respect to medical care and treatment under the workmen's compensation law except as expressly authorized by the workmen's compensation law. (Officially certified transcript printed in *McKinney's Consolidated Laws of New York Volume 16, Part 2*, at page 292.)

**Section 6515. Procedure in disciplinary proceedings.**

1. The committee on grievances shall be continued. Such committee shall consist of ten members who shall be appointed by the regents. The term of office of each of such members of such committee shall be five years. The terms of office of two members shall expire each year. In the case of vacancy at any time by resignation, death or otherwise in the membership of the committee, such vacancy shall be filled for the unexpired term in the same manner as provided for in the original selection of such member.

2. Any duly incorporated state medical or osteopathic society having two hundred or more members may nominate candidates for members of such committee, not to exceed three nominations for each member of such committee to which such society shall be entitled hereunder. When the candidates are so nominated the regents shall appoint for the terms specified herein as they shall determine, such

members of such committee, so that such committee shall consist of four members who have been duly nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and the regents upon their own nomination shall appoint three members of conspicuous professional standing. Each member of such committee shall be a duly licensed physician of this state.

3. The members of such committee shall serve without compensation and shall annually, within ten days after the first day of January of each year, organize by the election of a chairman and a secretary.

4. The members of such committee shall have jurisdiction to hear all charges against duly licensed physicians, osteopaths and physiotherapists of this state for violation of the provisions of section sixty-five hundred fourteen hereof, except subdivision one, and upon such hearing such committee shall determine such charges upon their merits, and the department may, after due notice and hearing, upon the receipt from such committee of the record, findings and determination of such committee wherein and whereby such practitioner has been found guilty, revoke and annul his license, annul his registration, suspend him from practice, or reprimand or otherwise discipline him. Proceedings against any practitioner under this section shall be begun by filing a written charge or charges against the accused. Such charges may be preferred by any person, corporation or public officer, and they shall be filed with the secretary of the committee on grievances and such secretary shall forward to the executive officer of the department a copy of such charges in all cases in which such committee or a subcommittee thereof shall deem a trial necessary. The chairman of such committee, when charges are preferred, may designate three or more of the members of such committee, including, whenever possible, at least one member

ho represents the same school of practice as the physician, osteopath or physiotherapist, against whom the charges are referred to hear and report upon such charges to such committee. The time and place of the hearing of such charges shall be fixed by the secretary of the committee as soon as convenient and a copy of the charges, together with notice of the time and place when they will be heard shall be served upon the accused or his counsel at least ten days before the date actually fixed for such hearing. Where personal service or service upon counsel after due diligence cannot be effected and such fact is certified on oath by any person duly authorized to make legal service, the secretary of the committee shall cause to be published for four times at least thirty days prior to the hearing, a notice of the hearing in a newspaper published in the county in which the physician, osteopath or physiotherapist was last known to practice, and a copy of such notice shall also be mailed to the accused at his last known address. All such notices of hearing of charges shall contain a plain and concise statement of the material facts without unnecessary repetition, but not the evidence by which the charges are to be proved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses and evidence upon his own behalf, to cross-examine such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the committee. Such sub-committee to whom such charges were referred shall make a written report of findings and recommendations and the same shall be forthwith transmitted to the secretary of the committee on grievances, with a transcript of the evidence. Said grievance committee may thereupon act upon such recommendation as it shall deem fit, or may take further testimony if the same shall seem desirable in the interest of justice. Thereupon the committee shall determine such

charges upon their merits (the vote of each member of such committee to be recorded as part of the committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them, the committee shall transmit to the department the record, findings and determination wherein and whereby such practitioner has been found guilty, and their recommendation, and the regents after due hearing shall in their discretion execute an order accepting or modifying such determination of the committee as hereinabove provided. If the practitioner is found not guilty, the committee shall order a dismissal of the charges, and the exoneration of the accused.

Nothing herein contained shall estop the department from initiating proceedings in any case.

5. Any licensed practitioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight of the civil practice act for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or enjoined except upon application to such appellate division, after notice to the attorney-general. The committee on grievances or any member thereof may issue subpoenas and administer oaths pursuant to section sixty-one of the public officers law in connection with any hearing or investigation under this article and it shall be the duty of such committee to issue subpoenas at the request of and upon behalf of the defense. The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain the same. The department shall furnish legal advice and assistance to the committee whenever such service is requested.

6. Any controversy between two or more physicians, osteopaths or physiotherapists, or between one or more physicians, osteopaths or physiotherapists and another person, which such parties to such controversy agree to submit to arbitration, may be submitted in writing to the committee on grievances, which may in its discretion, act as arbitrator in such controversy, and the decision of the committee upon such arbitration shall be final, and where the same orders the payment of a sum of money, the same may be docketed as a judgment of a court of record and enforced as such judgment, provided the terms of the arbitration include such provision.

7. The regents may remove any member of such committee from office who shall have been found guilty, after due hearing, of malfeasance in office or neglect of duty.

8. No member of the committee shall participate in any way in the hearing or determination of any charges in which he may be either a witness as to facts or an accused, nor in any case where the parties, complainant or accused, are related to him by consanguinity or affinity within the sixth degree. The degree shall be ascertained by ascending from the member of the committee to the common ancestor and descending to the party, counting a degree for each person in both lines, including the member of the committee and the party and excluding the common ancestor.

9. Should, for any reason, three or more members of the committee be disqualified from participating in the hearing and decision of any case, or be for other reasons unable to participate therein their places may be temporarily filled for the purpose of determining the case to be heard by the remaining members of the committee nominating twice the number of candidates for such vacancy from whom there shall be selected by the chairman of the committee, after notice to the respective parties, the necessary number of members to constitute a quorum. A quorum of the committee shall consist of six members.

10. Such committee shall have power to make such rules and regulations for the conduct of its business as it shall deem necessary, provided such rules and regulations do not conflict with any of the provisions of this article.

11. The committee shall have power, where a proceeding has been dismissed, either on the merits or otherwise, to relieve the accused from any possible odium that may attach by reason of the making of charges against him, by such public exoneration as it shall see fit to make if requested by the accused so to do. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2 at page 298.)

(16606)

FILED

DEC 29 1953

HAROLD B. WILLEY,

# Supreme Court of the United States

OCTOBER TERM 1953 — No. 69.

DR. EDWARD K. BARSKY,  
Appellant,  
—against—

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK.

## Reply Brief for Appellant.

Appellee's brief fails to controvert Appellant's arguments or authorities. Appellee lists eight points corresponding to Appellant's, and makes assertions thereunder that are supportive neither by reason nor authority; that do not even purport to come to grips with Appellant's contentions; that are erroneous in fact and law. Appellant adverts to some of those errors:

1. On page 2, Appellee claims: "The first mention of any constitutional question" was made in Appellant's brief "before the Appellate Division." On the contrary, Appellant presented the constitutional questions at his first opportunity, in his answer to the charges (R. 4-6). Since the Attorney General of New York, the Medical Committee on Grievances and the Committee on Discipline insisted that they would not hear argument on unconstitutionality and that such claims were for the courts only, Appellant stated on page 20 of his brief to the Committee on Discipline: "The defenses of unconstitutionality, set up in the third and fourth affirmative

defenses, need not be repeated here. \* \* \* Should this Board indicate a desire to go into that issue, we will submit a separate memorandum on the point." Appellant's answer to the charges became the basis of his petition to the Appellate Division; the defenses of unconstitutionality were repeated there (R. 14, VI. c). The Court of Appeals certified that constitutional questions were presented and passed upon. This Court noted probable jurisdiction.

On page 3, Appellee seeks to convey the impression that Judge Fuld "mentions" the constitutional questions casually in one short final paragraph. On the contrary, the dissenting opinion indicates clearly that the constitutional issues were uppermost in Judge Fuld's mind; they are alluded to repeatedly and vigorously throughout his opinion (R. 69-80).

2. The statement on page 3 that the disciplinary statutes as to doctors, lawyers, and dentists, are "substantially alike," is erroneous. As far as the pertinent issues are concerned, they are significantly dissimilar. For example, Appellee states that under the three statutes, "Revocation is mandatory" if a licensee "is convicted of a felony." This appears to be true only of the statutes involving lawyers and dentists. As Appellee's table on page 13 shows, upon conviction of a felony the attorney "*shall*" cease to be an attorney, and the dentist "*shall*" forfeit his license, but as to physicians the statute states that upon such a conviction his license "*may*" be annulled. Again contrary to Appellee's assertion, a hearing would appear to be necessary even though a physician were convicted of a felony. There are other pertinent differences, apparent from the same table: the dentists' statute specifically provides that the felonies mentioned include federal felonies; these provisions are omitted from the statutes governing doctors and lawyers. The lawyers' statute permits discipline upon conviction of a "crime or misdemeanor." The statutes involving doctors and dentists permit discipline upon conviction only of a crime but omit mention of misdemeanors, thus pointing up the difference alluded to on pages 36-7 of Appellant's original brief.

3. Appellee admits on page 3 that "Felony" is somewhat limited in meaning" for purposes of discipline against a physician, but nowhere does Appellee attempt to justify the conflict between the limited meaning attributed to "felony" in subdivision 1 and the unprecedented and expanded meaning attributed to "crime" in subdivision (2b), nor does Appellee even purport to deny or justify the irrational, unjust and discriminatory results adverted to in Point I of Appellant's brief.

4. On page 4, Appellee attempts to distinguish between "crime" in subdivision 2b, and "felony" in subdivision 1. This is an apparent recognition of the contradiction mentioned, but Appellee's claim that "crime" in subdivision 2b does not include "felony" in subdivision 1, is negated by the holding of the Court below that "crime" includes felonies as well as misdemeanors (R. 66). The result is that "felony" admittedly has a restricted meaning in subdivision 1, but "crime", which includes felonies and misdemeanors, has an expanded meaning in subdivision 2b, with all the conflicts, irrational discriminations, and unjustifiable results detailed in Appellant's brief.

5. On page 4, Appellee urges: "For all three professions conviction of a 'crime' includes convictions by courts outside the State," disregarding the fact that the dentists' statute specifically mentions and includes federal crimes but the doctors' and lawyers' statutes are restricted to those acts that are also made crimes in New York. Having erroneously attempted to equate the three statutes, Appellee claims in its second note on page 4, that the five cases there mentioned, sanctioned disbarment following federal convictions for offenses that have no counterpart in New York. The five cases involve lawyers, not doctors. None of those cases was in the Court of Appeals, the court of last resort. All the citations on the subject, in Point I of Appellant's brief, were Court of Appeals' citations specifically holding that convictions of

a doctor, lawyer or engineer in a federal court or in another state, will not result in disqualification in New York unless the offense on which the conviction was predicated has a counterpart in New York. Actually in Appellee's last cited case, *Matter of Hiss*, 276 App. Div. 701, the Court specifically pointed out that the perjury of which the attorney had been convicted was also a felony in New York. In *Matter of Butcher*, 269 App. Div. 545, the point was raised that the federal felony of which the attorney was convicted was not a crime in New York, and accordingly, the attorney was disbarred not by reason of the conviction but on a "charge of misconduct." It must be noted that "professional misconduct," which has long been a ground for disbarment, was not made a ground for revocation of a physician's license until 1953 (McKinney's Consolidated Laws of New York, Book 16, Part 3, Section 6514-2g, p. 130, footnote as to subdivision 2g). In Appellee's other three cases, not only was moral turpitude involved, but apparently no claim was made that the federal offense was or was not an offense in New York, nor can we tell whether the disbarment was upheld solely by reason of the conviction, or because of the "professional misconduct" clause which is part of the same Section 90(2) of the N. Y. Judiciary Law governing lawyers, as is the "conviction of a crime or misdemeanor" clause.

6. On page 5, Appellee cites five cases in this Court involving a claim of vagueness. In the first, *Mahler v. Eby*, 264 U. S. 32 (1924), it appears that the Court indicated it would refuse to apply the vagueness doctrine to a deportation statute pertaining to "undesirable" aliens, on the theory that deportation "is not a punishment" (p. 32). This view would appear to be superseded by the more recent view that deportation is a penalty and that the vagueness doctrine applies. *Jordan v. DeGeorge*, 341 U. S. 223, 231 (1951). We fail to perceive how the other four cases shed any light on the unlimited term "crime" at bar. It is submitted that the holding below that the "crimes" for which physicians may be

disciplined are those entrusted to "the good sense and judgment of our Board of Regents," reveals "a catchall enactment left at large by the State court which applied it." *Beaubarnais v. Illinois*, 343 U. S. 250, 253.

7. In Point 2 on page 6, Appellee appears to make the first, direct concession that reasonable relationship to the practice of medicine, is requisite. Appellee urges this relationship, on the theory that (a) "a bad citizen" should be disqualified, (b) because of "the discredit he can bring upon his fellow practitioners." Appellee has never claimed, much less attempted to prove, that Appellant was "a bad citizen" or that he engendered "discredit". Further, there is neither statutory nor other authority for such claim, nor did the Court below or the Regents, promulgate any such "standards". Still further, the test is not "discredit to his fellow practitioners," but substantial relationship to the "public health, safety, morals or some other phase of the general welfare." *Liggett v. Baldridge*, 278 U. S. 105, 111-3. Appellee might well find it impossible to define "a bad citizen" and the "discredit" phrase with sufficient certainty and delimitation to warrant suspension or revocation.

It is again significant that Appellee has failed to answer the arguments advanced in the dissenting opinion and in Appellant's brief to the effect that under the ruling below, a conviction of a physician for a traffic misdemeanor or for a violation of the segregation laws or for other acts "even meritorious" in New York, would be sufficient for revocation or suspension. Appellee is silent with respect to any attempt to justify this holding or result, either in reason, precedent or in relationship to the medical practice.

Appellee cites *Raab v. State Medical Board*, 156 Ohio St. 158. The fact that certiorari was denied does not mean that this Court passed upon the merits. Further, the Ohio statute plainly differs from the New York statute. In New York, subdivision 1 of Section 6514 specifically restricts felonies for which suspension or revocation will lie, to those that are also

made felonies by the laws of New York. There is no such statute in Ohio. The Court there construed the statute to include federal felonies. There is no evidence that the decision was in conflict with other holdings of the same court, as at bar. Appellee does not deny that all the Court of Appeals' cases mentioned in Appellant's Point I, hold that revocation or suspension of the licenses of a physician, lawyer or engineer, will not lie for conviction of a federal felony unless that felony is also made a felony under New York law. Nor does Appellee deny that the Court of Appeals also holds that a commutation agreement providing that the convict must serve out his sentence if convicted of a "felony either in New York State, or any other state," was *not* breached by a federal conviction of a felony that was *not* a felony in New York. Nor has Appellee attempted to justify the irrational, discriminatory and unjust results that flow from according this interpretation and policy to doctors, lawyers or engineers convicted of federal or extra-territorial felonies involving moral turpitude, and in denying that interpretation and policy to physicians convicted of a *lesser* offense, that does *not* involve moral turpitude, in connection with an act that is *not* made a crime in New York, and that was, as the Regents' Committee on Discipline stated, the "*only* method \*\*\* and the *traditional* method" of testing constitutionality (R. 57-58). The *Raab* case does not involve the undefined term "crime".

8. The statement on page 8 that the hearing before the Medical Grievance Committee was basically "oratory to persuade that Dr. Barsky was a humanitarian being persecuted for the breadth of his sympathies, or on the other hand that he was a dangerous subversive" is a prejudicial misstatement, without attempt at supporting reference. There was no "oratory" nor is any claimed in the reports of the Medical Grievance Committee and the Committee on Discipline, or in the opinions of the courts below. There was a motion to dismiss founded on claimed lack of jurisdiction. Upon denial, Appellant adduced oral testimony, documented in every

detail, to show the workings of the organization and his motives before the House Committee, all of which the Committee on Discipline reviewed carefully and held "were *not* material in the criminal trial" but "*are* material here" (R. 53). There was not an iota of contradictory proof; the report of the Committee on Discipline and the dissenting opinion both so indicate beyond dispute (R. 79-80). The majority opinion mentions no factual dispute.

Further, there was not the shadow of a claim by the Regents or by anyone else in the hearing, briefs or arguments before the Appellee or the courts below, that Appellant was a "subversive" or "a dangerous subversive."

The deliberate, unwarranted introduction of "dangerous subversion," is, we suggest, a plea to passion and prejudice, to hide the absence of moral justification and as a substitute for the lack of need for protection of the general welfare, evident from the inception of this matter. The evidence and finding as to the "listing", the spirit evident in the matter criticized here, and the stratagem adverted to in item 10 below, should, we submit, leave small doubt as to the motivation behind the charges and the proceedings: passion and prejudice—not protection.

9. The quotation from the report of the Medical Committee on Grievances, on page 9 of Appellee's brief, is significant. Appellant was not permitted to introduce the proof there mentioned, in his criminal trial, because, as the Committee on Discipline noted, it was not material there (R. 53). He did produce that evidence and proof in his hearing before the Regents. Although the Committee on Discipline later held this evidence and proof were material in that hearing, the Medical Grievance Committee (whose determination and recommendation were accepted by the Regents), stated, as indicated on page 9, that this evidence was not material, and that they would not be concerned with it. Appellant was

convicted in the criminal trial, and he was found guilty in the hearing before the Medical Grievance Committee. In other words, he was to be damned if he did not produce the evidence, and he was to be damned if he did produce the evidence.

10. It is regrettable that Appellee on page 9 found it necessary to resort to mention of the fact that Mr. Robert M. Benjamin, chairman of the Committee on Discipline, presented the appeal of Alger Hiss. We shall not belabor this hardly subtle artifice. It is of the pattern criticized in item 8. The Court of Appeals itself referred to Mr. Benjamin's work on administrative law (R. 68-9).

11. On page 10, Appellee, aware of and not disputing the "gross and prejudicial error" involved in the "listing" which was included in the report of the Medical Grievance Committee, essays the distinction that the Regents, in accepting the recommendation of that Committee, did not confirm its findings. The record states that the Regents not only adopted the recommendation but "accepted and sustained" the "determination" (R. 59-60) which was predicated on and is contained in and included under the "findings"; to claim otherwise is to claim there was no separate heading "Determination" and therefore the report failed to comply with the statute (R. 30; Sec. 6515(4)). The recommendation was plainly based upon the findings and determination. No such "distinction" as Appellee urges now, was ever claimed by Appellee or acknowledged by the courts below. The attempted distinction is hardly realistic enough to warrant acceptance in a suspension proceeding.

**Conclusion.**

A point-by-point comparison of both briefs will indicate that Appellee's brief is significantly silent on all the basic arguments and on all the authorities contained in Appellant's brief.

The judgment of the Court below should be reversed.

Respectfully submitted,

✓ **ABRAHAM FISHBEIN,**  
Attorney for Appellant.

MAY 13 1953

HAROLD B. WILLEY, C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 798 69

---

DR. EDWARD A. BARSKY,

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF  
NEW YORK

---

**STATEMENT OPPOSING JURISDICTION**

---

✓ NATHANIEL L. GOLDSTEIN,  
*Attorney General of New York.*

WENDELL P. BROWN,  
*Solicitor General,*

✓ HENRY S. MANLEY,  
*Assistant Attorney General,*  
*Of Counsel.*

**BLEED THROUGH**

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1952

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**No. 798**

---

DR. EDWARD A. BARSKY,

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF  
NEW YORK

---

**STATEMENT OPPOSING JURISDICTION**

The opinions of the Court of Appeals are reported as *Matter of Barsky v. Board of Regents*, 305 N. Y. 89. The decision of the lower appellate Court is reported as *Matter of Barsky v. Board of Regents*, 279 App. Div. 1117 mem., which cites and relies upon *Matter of Auslander (and Miller) v. Board of Regents*, 279 App. Div. 447. All these opinions and the appropriate statute (N. Y. Education Law §§ 6514-6515) are appended to the "Statement as to Jurisdiction".

The appeal appears to be timely and is from a final decision or judgment of the highest Court of the State of New York.

The Petitioner-Appellant claimed in the Courts of the State certain rights and immunities under the Constitution

of the United States and was unsuccessful upon those questions. No Federal question was noticed in the opinions written in the Appellate Division or in the majority opinion of the Court of Appeals. The only suggestion of a Federal question was in the last two paragraphs of the dissenting opinion by Judge Fuld (see 305 N. Y. at page 109).

Subsequent to the decision on the merits by the Court of Appeals it amended its remittitur herein by adding the following paragraph:

“Upon the appeals herein there were presented and necessarily passed upon questions under the Federal Constitution, viz., whether sections 6514 and 6515 of the Education Law, as construed and applied here, are violative of the due process clause of the Fourteenth Amendment. This Court held that the rights of the petitioners under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied.”

This Court has sometimes held that such a certificate is merely a guide to it when making its independent determination whether substantial Federal questions are involved. *Honeyman v. Hanan*, 300 U. S. 14 (1937). Particularly when the State courts have rendered lengthy written opinions such a certificate is of limited usefulness.

It is respectfully submitted that the appeal should be dismissed or the judgment below should be affirmed on the ground that no substantial Federal question is involved. The dissenting opinion by Judge Fuld, the only opinion which notices such questions, does them full justice but shows that they are incidental.

It suggests that the Education Law provisions may involve an excessive delegation of legislative power. Since his opinion was first issued in the form appended to the “Statement of Jurisdiction”, where it cites only the *Packer Institute* case upon the delegation issue, there has

been added (see 305 N. Y. at page 109) a reference to *Niemotko v. Maryland*, 340 U. S. 268, 273, and to another case which like the *Packer Institute* case involved the State Constitution. These do not support the suggestion that the Education Law provisions involved in the present appeal are so vague or general as to be objectionable under the Constitution of the United States.

The citation of *Ex parte Garland* in the last paragraph of Judge Fuld's dissenting opinion suggests a Federal constitutional question but neither the facts of that case nor the method of his reference to it charge the Education Law provisions with any specific violation of the Constitution of the United States.

The proposed Federal questions suggested by the "Statement as to Jurisdiction" are "thin" in about the same degree that the document is thick. Probably there are many precedents for such an inverse correlation.

Dated, Albany, May 18, 1953.

NATHANIEL L. GOLDSTEIN,  
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Attorney for Appellee.*

WENDELL P. BROWN,  
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HENRY S. MANLEY,  
*Assistant Attorney General,  
Of Counsel.*

DEC 21 1953

HAROLD B. WILLEY, C

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 69

DR. EDWARD K. BARSKY,  
*Appellant,*  
*against*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK.

## BRIEF FOR APPELLEE

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BLEED THROUGH

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# Supreme Court of the United States

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OCTOBER TERM, 1953

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No. 69

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DR. EDWARD K. BARSKY,

*Appellant,*

*against*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK.

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## BRIEF FOR THE BOARD OF REGENTS, APPELLEE

The appellant, Dr. Barsky, is licensed to practice medicine in the State of New York.

A statutory provision related to the one under which he is licensed provides for disciplinary action against a doctor if he:

“has been convicted in a court of competent jurisdiction, either within or without this state, of a crime.”

Dr. Barsky was convicted in 1947 of contempt of Congress, which is defined in 2 U. S. C. § 192. The conviction was in the District Court of the United States for the District of Columbia. Affirmance by the Court of Appeals and denial of certiorari by this Court left no doubt that the conviction was in “a court of competent jurisdiction”.

*Barsky et al. v. United States*, 167 F. 2d 241; 334 U. S. 843 mem. and 339 U. S. 971 mem.

The statute quoted above was invoked by appropriate administrative proceedings and the Board of Regents determined on September 28, 1951, that Dr. Barsky's medical license should be suspended for six months (R. 59-60).

Dr. Barsky then filed a petition in the New York courts by which he entered upon a course of judicial review. Although the New York practice act does not specifically require that such a petition state the questions of law relied upon (C. P. A. § 1288) the general rule is that an issue of constitutionality will not be considered subsequently if not raised by the petition. *Matter of Thomas v. Bd. of Standards and Appeals*, 290 N. Y. 109 (1943); *Matter of Robusto v. Tibbetts*, 277 App. Div. 1008 mem. (2d Dept. 1950). Dr. Barsky's petition did not suggest any constitutional question (R. 13-28, particularly paragraph XVII at R. 26) and no constitutional question had been suggested during the administrative phases of the proceeding. That is to say, before the Medical Grievance Committee and the Regents Committee and the Board of Regents Dr. Barsky had conceded the constitutionality of the statute under which they were acting, so far as silence was a concession. Likewise his only pleading before the courts stated no constitutional grounds.

The first mention of any constitutional question was at page 82 of Dr. Barsky's brief before the Appellate Division, Third Department. That Court made no mention of any such question in its memorandum or in the opinion mentioned therein. *Matter of Barsky v. Bd. of Regents*, 279 App. Div. 1117 mem.; also 279 App. Div. 447.

Dr. Barsky appealed to the Court of Appeals of New York State and again presented constitutional questions

incidental to some serious questions of statutory interpretation. The highest court of the State interpreted the statute as applying to Dr. Barsky's case and upheld the determination of suspension. *Matter of Barsky v. Bd. of Regents*, 305 N. Y. 89, also R. 64-80. The only mention of constitutional questions is in one of the final paragraphs of Judge Fuld's dissenting opinion, found at R. 79 and at pages 108-109 of 305 N. Y.

The Court of Appeals has certified by amendment of its remittitur that questions under the Fourteenth Amendment were presented and necessarily passed upon. R. 82, also 305 N. Y. 691 mem. This Court has found probable jurisdiction.

Accordingly, this brief will be directed to the eight points of the Appellant's Brief. It will be arranged under corresponding point numbers. By confining it to constitutional issues, without any restatement of contentions of fact and of statutory interpretation that are irrelevant in this Court, some economy of paging may be possible.

## POINT I

### **The statute is not vague**

Doctors, lawyers and dentists are treated substantially alike under New York statutes. See the tabulation at the back of this brief.

If a licensee is convicted of a felony he loses his professional status. Revocation is mandatory. No hearing is necessary and there is no discretion. "Felony" is somewhat limited in meaning for that purpose. Since 1926 in the case of doctors, and since 1940 in the case of lawyers,

conviction of a "felony" means conviction of an offense which if committed within New York State would constitute a felony under its laws.\*

If a licensee is convicted of a "crime" (obviously meaning, in the context, a crime which is not a felony for purposes of peremptory revocation) he is subject to disciplinary action ranging from censure to revocation. In such cases there must be a hearing and an appropriate body is given discretion to determine what measure of discipline, if any, should be imposed. For lawyers this discretionary power rests with the Appellate Division, a court of five judges. For doctors and dentists it rests with the Board of Regents and subordinate bodies representing the respective professions. For all three professions conviction of a "crime" includes convictions by courts outside the State and there is no requirement that "moral turpitude" or professional activities be a factor in the crime.\*

If it would serve any useful purpose a great body of similar law in New York State and elsewhere could be shown. These laws are not new. The idea that they are constitutionally objectionable has been a long time reaching this Court.

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\* That the scope of the statute about doctors formerly was broader can be seen in Public Health Law (N. Y.) § 161 before its general revision by L. 1926, c. 834. For a long list of peremptory disbarments based on Federal convictions for felonies before *Matter of Donegan*, 282 N. Y. 285 (1940), see a note in 79 A. L. R. 39. The statute about dentists still uses the word "include" instead of "be" and apparently still has the broader meaning. See the tabulation at the back of this brief.

\* Disbarments since 1940 which have followed Federal convictions for offenses having no exact counterpart under New York law include: *Matter of Greenberger*, 265 App. Div. 343 (1942, draft evasion); *Matter of Turley*, 268 App. Div. 706 (1945, transporting stolen securities in interstate commerce); *Matter of Butcher*, 269 App. Div. 545 (1945, embezzlement of mail by p. o. employee); *Matter of Hiss*, 276 App. Div. 701 (1950, perjury before Federal grand jury).

It is argued that the statutory provisions now involved are "so vague, unlimited, indefinite, capricious and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment". Appellant's Brief, page 27. It seems fairly clear that no such vagueness can be in the word "crime". Indeed, it would be time to stop using printed English as a means of attempting communication if there were unconstitutional vagueness anywhere in the language:

"has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Compare the foregoing with the statutory language which was upheld against the charge of vagueness in *Mahler v. Eby*, 264 U. S. 32 (1924); *Patterson v. Stanolind*, 305 U. S. 376 (1939); *U. S. v. Rock Royal Co-op.*, 307 U. S. 533 (1939); *Adler v. Board of Education*, 342 U. S. 485 (1952) and *Beauharnais v. Illinois*, 343 U. S. 250 (1952). It is odd that the Appellant's Brief argues that it is a vice of the present statute that it is not limited to a "crime involving moral turpitude". A statute turning upon that phrase gave this Court some trouble in *Jordan v. DeGeorge*, 341 U. S. 223 (1951).

Appellant's Brief argues that the statute is unconstitutional insofar as it gives the Board of Regents a broad discretion as to the measure of discipline. There is nothing novel or extraordinary about this power. It existed in New York and other states as long ago as 1898, when *Hawker v. New York*, 170 U. S. 189, was before this Court. See the provisions summarized in a footnote, pages 191-193. It is the power which an Appellate Division has over lawyers, and it exists in many forms. The power to do justice in a wide variety of individual cases necessarily implies the

power to choose broadly. The ideal of "a government of laws" is not written into the Constitution so specifically as to compel Procrustean uniformity.

## POINT II

### **The statute is reasonably related to the practice of medicine.**

*Raab v. State Medical Board*, 342 U. S. 944 mem. (1952), was a denial of certiorari to review the decision of the Supreme Court of Ohio reported at 156 Ohio St. 158, 101 N. E. 2d 294. The petitioner was an Ohio doctor whose license was revoked by the State Board under a statute which gave discretion to suspend or revoke if the licensee was "guilty of felony". Dr. Raab was convicted in a United States District Court for evading Federal income tax. Although the Ohio statute did not apply specifically to other than State felonies the Supreme Court of Ohio interpreted it as being applicable in that case, saying:

"Citizens and residents of Ohio, as they go about their daily work or pursue their professions are subject to the laws of the United States as well as the laws of Ohio. They are protected by both and must pay the penalty for violation of either. The operation of the federal courts in Ohio is necessary for the good of Ohio citizens. The enforcement of federal statutes in Ohio is as necessary as the enforcement of Ohio statutes. No one would deny that every Ohio citizen is amenable to the federal income tax laws."

Similarly, violations of Federal law are not a matter of unconcern to New York State. See, upon that subject, the observations of Judge Lehman in *People v. Lafaro*, 250 N. Y. 336 (1929). See, also the dissenting opinion of Judge Loughran in 282 N. Y. at page 295. For certain purposes the statutes of the State mandate conse-

grances based upon convictions or acquittals in other states or the Federal courts. See Correction Law § 617; Code Crim. Pro. § 139; Penal Law § 33, § 1941, § 1942; Election Law § 152, subd. 4. Surrogate's Court Act § 94, subd. 4, disqualifies a "felon" from serving as executor, administrator, trustee or guardian. This provision has recently been applied to a New Jersey conviction, notwithstanding that the offense was only a misdemeanor in New Jersey, it being a felony in New York. *Matter of Johnson*, 202 Misc. 751 (1952).

Convictions outside the State frequently are acted upon relative to professional licensing. Professional status, like public office, is a special trust. One who is a bad citizen may or may not be capable in law or medicine or dentistry but limits are set to the discredit he can bring upon his fellow practitioners. In New York State, and many other states, those limits are fixed no more exactly than to confer upon certain bodies representative of each profession the power to purge from it or otherwise discipline those who are convicted of crime, within or without the state. There is no constitutional reason why New York State cannot thus act against any professional man who is a bad citizen, under its own laws or those of the United States.

### **POINT III**

**The alleged errors of the administrative bodies in receipt and consideration of evidence do not render the suspension unconstitutional.**

Point III of the Appellant's Brief misstates the facts to allege an error and then transmutes the alleged error into a constitutional point. Discussing this matter leads us, by irritation, into a discursiveness thus far avoided. Consti-

tutionally, it is irrelevant if the Medical Grievance Committee received some evidence it should not have received. The New York courts have decided that the evidence did not substantially affect the outcome, and this Court will not reopen that question of surmise.

The alleged admission that the Regents "ignored weighty considerations and acted on matters not proper for consideration" (App. Br. p. 49 citing R. 68) is found, when the citation is used, *not* to have been an admission by the Court of Appeals. It was merely "assertions by appellants". And the statutory provision in Education Law § 6515, subd. 5, quoted somewhat misleadingly in the same paragraph, is as follows:

"The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same."

Nearly all that is in the 463 typed pages of the hearing record before the Medical Grievance Committee was oratory to persuade that Dr. Barsky was a humanitarian being persecuted for the breadth of his sympathies, or on the other hand that he was a dangerous subversive. He and his counsel set the standard of digression. The Committee could not limit it without being charged with having refused to hear Dr. Barsky's side of the case.

His motivation is a complex matter, perhaps beyond analysis by any human tribunal. It should be sufficient for the present to remember that he was told authoritatively that the Congressional inquiry was to find out whether the Anti-Fascist Committee was subversive and had spent on propaganda part of the considerable sums it had raised, and Dr. Barsky did what he could to thwart the inquiry.

The Medical Grievance Committee summarized as follows its views on this topic, formed on the bulky vagrant record made before it:

"We do not feel that we are now concerned, nor would we be able to determine, whether the books and records of that [Anti-Fascist] Committee would disclose whether the Committee was completely philanthropic in character, or whether it was engaged in subversive activities." (R. 33)

Those words were written on April 25, 1951. The Medical Grievance Committee knew that the Attorney General of the United States had listed the Anti-Fascist Committee as subversive (R. 33). Presumably it knew also of the non-unanimous decision in 1949 by the Court of Appeals of the District of Columbia (*Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79) and that certiorari had been granted by this Court (339 U. S. 910 mem.). The Medical Grievance Committee was unanimous in its recommendation that Dr. Barsky's medical license should be suspended, four members thinking three months suspension sufficient and six members recommending six months (R. 35).

The matter went then to the Regents Committee on Discipline, of which Robert M. Benjamin is chairman, the other members being Dr. Bauer and Susan Brandeis (R. 59). Chairman Benjamin, at least, is not a person to be swayed by a mere charge of subversion. While the present case had been before the Medical Grievance Committee he had been presenting the appeal of Alger Hiss before the Second Circuit and in an application to this Court (185 F. 2d 822, 340 U. S. 948 mem.). The decision by this Court that the Anti-Fascist Committee was improperly listed by the Attorney General (341 U. S. 123) came after the recommendation by the Medical Grievance Committee

**FINALLY**

It is respectfully submitted that the appeal should be dismissed or the judgment of the Court of Appeals should be affirmed.

Albany, December 16, 1953.

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<p><i>Dentists</i></p> <p><b>Doctors</b> Whenever any practitioner, etc., shall be convicted of a felony as defined in § 6502 the registration of the person so convicted may be annulled and his license revoked by the department. (Ed. Law § 6514 subd. 1)</p> <p><b>Felony conviction brings mandatory revocation</b> <i>Must it be New York felony?</i></p>	<p><b>Lawyers</b> Any attorney who shall be convicted of a felony shall, upon such conviction, cease to be an attorney. (Judiciary Law § 90 subd. 4)</p> <p><b>Doctors</b> The conviction of a felony shall be the conviction of any offense which if committed within the state of New York would constitute a felony under the laws thereof. (Ed. Law § 6502)</p> <p><b>Felony conviction brings mandatory revocation</b> <i>Must it be New York felony?</i></p>	<p><b>Doctors</b> The conviction of a felony shall be the conviction of any offense which if committed within the state of New York would constitute a felony under the laws thereof. (Ed. Law § 6502)</p> <p><b>Felony conviction brings mandatory revocation</b> <i>Must it be New York felony?</i></p>	<p><b>Lawyers</b> A conviction of felony shall forfeit a license to practice dentistry (Ed. Law § 6613 subd. 12)</p> <p><b>Doctors</b> The conviction of a felony aforementioned shall include the conviction of a felony by any court in this state or by any court of the United States and in the event that a crime of which the practitioner is convicted by any court of the United States or by any other state is not a felony in the jurisdiction in which the conviction is had but is a felony in the state of New York, then the conviction shall be deemed a conviction of a felony for the purposes of this article. (Ed. Law § 6613 subd. 13)</p> <p><b>Dentists</b> The dentist's license may be revoked or suspended or he may be censured if he has been convicted in a court of competent jurisdiction, within or without this state, of a crime. (Ed. Law § 6511 subd. 2)</p>
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OCT 2 19

HAROLD B. WILLE

# Supreme Court of the United States

October Term—1953

No. 69

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DR. EDWARD K. BARSKY,

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK,

*Respondent.*

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

Now come Haven Emerson, Paul Klemperer, Leo Mayer and I. Ogden Woodruff, and (555) other physicians licensed to practice in the State of New York, and respectfully move this Court, pursuant to Rule 27, Par. 9 of the Rules of this Court, for leave to file the accompanying brief in this case *amici curiae*. The consent of the attorney for the appellant herein for filing this brief has been obtained. The consent of the attorney for the respondent was requested but was refused.

The interest of the undersigned and their reasons for asking for leave to file the annexed brief on behalf of themselves and the other signators are as follows:

The right of a physician to practice his profession is a right to liberty and property which he may not be denied without due process of law. The court below has construed state legislation to authorize a denial of this right, based upon the appellant's conviction in a federal court for refusing to produce certain records before a Congressional Committee, notwithstanding that such refusal is not crim-

inal under state law and, concededly, did not reflect upon the appellant's professional competence or integrity. We believe as Judge FULL stated in his dissent that "the legislature advances into the individual's constitutional right to liberty and property when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise."

The decision of the lower court is thus fraught with serious consequences for the entire medical profession. We believe, therefore, that this Court will be assisted by the accompanying brief, submitted by a representative group of New York physicians, which sets forth the reasons why, from the point of view of the profession, the important constitutional questions involved in this case should be reviewed.

Respectfully submitted,

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# Supreme Court of the United States

October Term—1953

No. 69

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DR. EDWARD K. BARSKY,

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK,

*Respondent.*

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## BRIEF OF AMICI CURIAE

### Preliminary Statement

The signatories to this brief are all practicing physicians, licensed in the State of New York. They submit this brief, as friends of the Court, in support of the appeal of Dr. Edward K. Barsky from the order of the Court of Appeals of New York, affirming the action of the Board of Regents of that state in suspending his license to practice medicine for the period of six months.

We are motivated in filing this brief by our belief that the decision of the Court of Appeals abridges the constitutionally protected right of physicians to practice their profession. The Court of Appeals reached its decision by construing the laws of New York to permit the suspension or revocation of a medical license for conduct which has no relation whatsoever to professional competence or the fitness of the physician to practice. We are concerned, therefore, both by what we conceive to be an injustice to an

individual member of our profession, and by the long range consequences of the decision upon all medical practitioners. As Judge FULD said in his dissenting opinion "• • • the present decision has an importance that transcends and reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me" (p. 65).\* In that aspect, this case presents constitutional questions of general importance, and of special concern to the medical profession, which should be reviewed by this Court.

In filing this brief, we take no position as to other questions which may be raised on appeal. Nor do we take any position with reference to the aims or objectives of the Joint Anti-Fascist Refugee Committee or Dr. Barsky's activities as its former chairman, except to point out, as Judge FULD stated, that they cast no reflections upon Appellant's character or fitness to practice his profession.

### **Summary of the Facts**

Petitioner's license was suspended by the Board of Regents, acting under the authority of sub-division 2 of section 6514 of the State Education Law. That section authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without the State, of a crime."

The conviction upon which the suspension order was predicated was secured against Appellant for the misdemeanor of "contempt of Congress" under title 2, section 192 of the United States Code by reason of his failure to obey a subpoena of the House Committee on Un-American Activities ordering him to produce books and records of the Joint Anti-Fascist Refugee Committee.

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\* All page references to the opinions of the Court of Appeals are to Appellant's Statement As To Jurisdiction where they are printed in full.

As Judge FULD states in his dissent (pp. 60-61), the order of suspension was made notwithstanding the following uncontradicted facts which appear from the proceedings before the Board of Regents:

1. The "crime" of which Dr. Barsky was convicted involved no moral turpitude.
2. In refusing to produce the subpoenaed records, he acted on advice of counsel that the subpoenas were unconstitutional and invalid, an opinion which at that time "was not an unreasonable construction of the law."
3. His refusal to produce the subpoenaed records was motivated, in part, by the fact that they would publicly reveal the names of Spanish Republican exiles and, in his opinion, endanger the lives of their families who resided in Spain.
4. Dr. Barsky's views with reference to the invalidity of the subpoenas and the dire consequences of a public disclosure of the records were honestly held.

Thus, as Judge FULD's opinion states and as the majority of the Court of Appeals tacitly concedes, "the record was barren of evidence reflecting upon appellant as a man or a citizen, much less upon his professional capacity or his past or anticipated conduct toward his patients" (p. 61).

Nevertheless, a majority of the Court of Appeals sustained the action of the Board of Regents. It arrived at this result by giving a literal construction to the words of the Education Law and holding that conviction of *any* crime *anywhere* warrants disciplinary action (including suspension or revocation of a physician's license) notwithstanding the fact that the conviction rests upon conduct which is neither a crime under New York Law or even morally reprehensible in the eyes of the citizens of that state.

## ARGUMENT

**The applicable provisions of the New York Education Law, as construed by the Court of Appeals, violate the due process clause of the Fourteenth Amendment to the Constitution.**

The right of a physician to practice his profession is clearly a right to "liberty and property" which he may not be denied without due process of law. It is a fundamental requirement of due process that a legislative curtailment of the liberty or property of the individual must bear some reasonable and substantial relation to the requirements of the public health, safety or morals.

A legislature may, of course, prescribe qualifications for the practice of medicine. But the qualifications so prescribed must bear a reasonable relation to the fitness of the individual to practice his profession. They must be "appropriate to the calling." *Dent v. West Virginia*, 129 U. S. 114, 122. If they are not, they offend due process because they protect no legitimate interest of the state, but operate arbitrarily to deny a qualified physician the right to engage in a lawful and essential vocation.

In the present case, the Court of Appeals has construed the Education Law to authorize the suspension or revocation of a medical license upon a showing that the practitioner has been convicted of *some* "crime" *somewhere*, irrespective of the nature of the offense or its relation to the fitness of the physician to practice his profession. That court's construction of New York legislation is, of course, binding on this Court. But so construed, the Education Law offends due process since it authorizes the arbitrary denial of the right to practice medicine based upon conduct which has no reasonable relation to the qualifications of the physician.

On the facts of this case, as the Regents' Committee on Discipline found, and as the Court of Appeals in substance concedes, the conduct which resulted in Dr. Barsky's conviction was wholly unrelated to his professional competence or to his integrity as a man and as a doctor. A law which authorizes the suspension of his medical license under these circumstances cannot survive the test of due process. For, as Judge FULD stated in his dissent "the legislature advances into the individual's constitutional right to liberty and property when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise" (p. 62).

Dr. Barsky is threatened with suspension because he took his stand before the Committee on Un-American Activities on matters of personal confidence and assertions of constitutional right, the latter pursuant to the advice of competent counsel. But the consequences of the decision of the Court of Appeals transcend the injustice done to the individual physician before the Court in this proceeding. The decision jeopardizes the license of any physician who, though entirely innocent of wrong-doing by New York standards, finds himself convicted of an infraction of law elsewhere.

As Judge FULD states:

"In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's 'without the state,' if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's

opinion—"in some other state (or country) which we in New York consider non-criminal, or even meritorious'" (p. 64)

Thus, as Judge FULL points out, the Court of Appeals decision would warrant the revocation of the license of a physician who was convicted in a southern state for violating a segregation ordinance, or in Kansas for drinking alcoholic liquor in a public place (p. 64).

The Court of Appeals replies to this demonstration of the arbitrary consequences that flow from its construction of the law with the statement that "some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases" (p. 56). But the very purpose of the guarantees of the Constitution was to substitute the command of law for the "good sense and judgment" of men in matters touching the fundamental rights of life, liberty and property. It does not save the constitutionality of the law to say that the Board of Regents *may not* revoke or suspend a physician's license on some insubstantial ground. It is sufficient to condemn the law that it *authorizes* the Board to do so. *Bailey v. Alabama*, 219 U. S. 219, 235.

Moreover, the "theoretically possible" case to which the majority alluded was before it in this proceeding. For, as we have seen, it is not contended that the conduct which resulted in Dr. Barsky's conviction reflected in any way on his fitness to practice. Indeed, counsel for Dr. Barsky urged that the action of the Board of Regents was not only arbitrary but was based on matters that the Board had no authority to consider. But the Court of Appeals refused to examine the merits of this contention, saying:

"As to the assertions by appellants that the Regents dealt too severely with them, or that the Regents, in

deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to consider these questions." (pp. 57-58) (Italics supplied.)

As Judge FULD commented, "If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits" (p. 67).

As practicing physicians, the signatories to this brief have a vital interest in the enforcement of the highest standards of professional competence and personal integrity among members of the medical profession. We have an equally deep-seated concern for the protection of the physician against the arbitrary deprivation of his right to practice. The security of the individual physician and the right of society to his services should be conditioned only on conduct reasonably related to his fitness to practice and "appropriate to his calling". The public welfare requires no more. Constitutional guarantees are satisfied with no less.

### CONCLUSION

**For the foregoing reasons, the undersigned urge the Court to review and reverse the decision of the Court of Appeals.**

Respectfully submitted,

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Representing Themselves and 555  
Other Physicians Licensed to Practice  
in the State of New York.

# SUPREME COURT OF THE UNITED STATES

No. 69.—OCTOBER TERM, 1953.

Dr. Edward A. Barsky, Appellant,  
*v.*  
The Board of Regents of the  
University of the State of New  
York.

On Appeal From the  
Court of Appeals of  
the State of New  
York.

[April 26, 1954.]

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question here presented is whether the New York State Education Law,<sup>1</sup> on its face or as here construed and applied, violates the Constitution of the United States by authorizing the suspension from practice, for six months, of a physician because he has been convicted, in the United States District Court for the District of Columbia, of failing to produce, before a Committee of the United States House of Representatives, certain papers subpoenaed by that committee.<sup>2</sup> For the reasons hereafter stated, we hold that it does not.

In 1945, the Committee of the United States House of Representatives, known as the Committee on Un-Amer-

<sup>1</sup> McKinney's N. Y. Laws, Education Law, §§ 6514, 6515.

<sup>2</sup> The conviction was for violating R. S. § 102, as amended, 52 Stat. 942, 2 U. S. C. § 192:

"SEC. 102. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

ican Activities, was authorized to make investigations of "the extent, character, and objects of un-American propaganda activities in the United States."<sup>3</sup> In 1946, in the course of that investigation, the committee subpoenaed Dr. Edward K. Barsky, appellant herein, who was then the national chairman and a member of the executive board of the Joint Anti-Fascist Refugee Committee, to produce "all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or any subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946."<sup>4</sup> Similar subpoenas were served on the executive secretary and the other members of the executive board of the Refugee Committee. Appellant appeared before the Congressional Committee but, pursuant to advice of counsel and the action of his executive board, he and the other officers of the Refugee Committee failed and refused to produce the subpoenaed papers.

In 1947, appellant, the executive secretary and several members of the executive board of the Refugee Committee were convicted by a jury, in the United States District

<sup>3</sup> "The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 91 Cong. Rec. 10, 15. This was carried into the Rules of the House as Rule XI (q)(2), 60 Stat. 823, 828.

<sup>4</sup> *United States v. Bryan*, 72 F. Supp. 58, 60.

Court for the District of Columbia, of violating R. S. § 102, as amended, 2 U. S. C. § 192, by failing to produce the subpoenaed papers. Appellant was sentenced to serve six months in jail and pay \$500. See *United States v. Bryan*, 72 F. Supp. 58; *United States v. Barsky*, 72 F. Supp. 165. In 1948, this judgment was affirmed by the Court of Appeals, *Barsky v. United States*, 83 U. S. App. D. C. 127, 167 F. 2d 241, and certiorari was denied, 334 U. S. 843. In 1950, a rehearing was denied. Two Justices noted their dissents, and two did not participate. 339 U. S. 971. Appellant served his sentence, being actually confined five months.<sup>5</sup>

Appellant was a physician who practiced his profession in New York under a license issued in 1919. However, in 1948, following the affirmance of his above-mentioned conviction, charges were filed against him with the Department of Education of the State of New York by an inspector of that department. This was done under § 6515 of the Education Law, seeking disciplinary action pursuant to subdivision 2 (b) of § 6514 of that law:

“2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

“(b) That a physician, osteopath or physiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or . . . .”

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<sup>5</sup> For related litigation, see *United States v. Bryan*, 339 U. S. 323; *United States v. Fleischman*, 339 U. S. 349; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.

In 1951, after filing an amended answer, appellant was given an extended hearing before a subcommittee of the Department's Medical Committee on Grievances. The three doctors constituting the subcommittee made a written report of their findings, determination and recommendation, expressly taking into consideration the five months during which appellant had been separated from his practice while confined in jail, and also the testimony and letters submitted in support of his character. They recommended finding him guilty as charged and suspending him from practice for three months. The ten doctors constituting the full Grievance Committee unanimously found appellant guilty as charged. They also adopted the findings, determination and recommendation of their subcommittee, except that, by a vote of six to four, they fixed appellant's suspension at six months. Promptly thereafter, the Committee on Discipline of the Board of Regents of the University of the State of New York held a further hearing at which appellant appeared in person and by counsel. This committee consisted of two lawyers and one doctor. After reviewing the facts and issues, it filed a detailed report recommending that, while appellant was guilty as charged, his license be not suspended and that he merely be censured and reprimanded.<sup>6</sup> The Board of Regents, however, returned to and sustained the

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<sup>6</sup> The committee said:

"Since violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that Respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded."

determination of the Medical Committee on Grievances, and suspended appellant's license for six months.<sup>7</sup>

Appellant sought a review of this determination, under § 6515 of the Education Law, *supra*, and Article 78 of the New York Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6B, 1944, §§ 1283-1306. The proceeding was instituted in the Supreme Court for the County of Albany and transferred to the Appellate Division, Third Department. That court confirmed the order of the Board of Regents. *In re Barsky*, 279 App. Div. 1117, 112 N. Y. S. 2d 778, and see 279 App. Div. 447, 111 N. Y. S. 2d 393, and 279 App. Div. 1101, 112 N. Y. S. 2d 780, 781. The Court of Appeals, with one judge dissenting, affirmed. 305 N. Y. 89, 111 N. E. 2d 222. That court allowed an appeal to this Court and amended its remittitur by adding the following:

"Upon the appeals herein there were presented and necessarily passed upon questions under the Federal Constitution, viz., whether sections 6514 and 6515 of the Education Law, as construed and applied here, are violative of the due process clause of the Fourteenth Amendment. The Court of Appeals held that the rights of the petitioners under the Four-

<sup>7</sup> The order suspending appellant's license was issued by the Commissioner of Education in 1951, but its effect was stayed by the New York Court of Appeals, pending an appeal to this Court. 305 N. Y. 691, 112 N. E. 2d 773.

At about the same time, the board fixed at three months the suspension of the license of another doctor who was a member of the executive board of the Refugee Committee and who had been convicted with appellant. It also directed that a third doctor, who was a member of the same board, be censured and reprimanded. Each such determination was confirmed by the New York courts simultaneously with the confirmations relating to appellant. See 279 App. Div. 447, 111 N. Y. S. 2d 393; 279 App. Div. 1101, 112 N. Y. S. 2d 780, 781; 279 App. Div. 1117, 112 N. Y. S. 2d 778; and 305 N. Y. 89, 111 N. E. 2d 222.

teenth Amendment of the Constitution of the United States had not been violated or denied." 305 N. Y. 691, 112 N. E. 2d 773.

We noted probable jurisdiction, the Chief Justice not participating at that time. 346 U. S. 807, 801.

That appellant was convicted of a violation of R. S. § 102, as amended, 2 U. S. C. § 192, in a court of competent jurisdiction is settled. In the New York courts, appellant argued that a violation of that section of the federal statutes was not a crime under the law of New York and that, accordingly, it was not a "crime" within the meaning of § 6514-2 (b) of the New York Education Law. He argued that his conviction, therefore, did not afford the New York Board of Regents the required basis for suspending his license. That issue was settled adversely to him by the Court of Appeals of New York and that court's interpretation of the state statute is conclusive here.

He argues that § 6514-2 (b) is unconstitutionally vague. As interpreted by the New York courts, the provision is extremely broad in that it includes convictions for any crime in any court of competent jurisdiction within or without New York State. This may be stringent and harsh but it is not vague. The professional standard is clear. The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of the discipline to the specific case.

A violation of R. S. § 102, as amended, 2 U. S. C. § 192, is expressly declared by Congress to be a misdemeanor. It is punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment for not less than one month nor more than twelve months. See note 2, *supra*. For its violation appellant received a sentence of one-half the maximum and served five months in jail. There can be no doubt that appellant was convicted in a court

of competent jurisdiction of a crime within the meaning of the New York statute.\*

It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health. In Title VIII of its Education Law, the State of New York regulates many fields of professional practice, including medicine, osteopathy, physiotherapy, dentistry, veterinary medicine, pharmacy, nursing, podiatry and optometry. New York has had long experience with the supervision of standards of medical practice by representatives of that profession exercising wide discretion as to the discipline to be applied. It has established detailed procedures for investigations, hearings and reviews with ample opportunity for the accused practitioner to have his case thoroughly considered and reviewed.

Section 6514, as a whole,<sup>9</sup> demonstrates the broad field of professional conduct supervised by the Medical Com-

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\* The subsequent designation of certain other contempts of Congress as federal "crimes" (18 U. S. C. § 402) does not prevent this misdemeanor from being a crime within the meaning of the New York statute.

<sup>9</sup> "§ 6514. Revocation of certificates; annulment of registrations

"1. Whenever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony, as defined in section sixty-five hundred two of this article, the registration of the person so convicted may be annulled and his license revoked by the department. It shall be the duty of the clerk of the court wherein such conviction takes place to transmit a certificate of such conviction to the department. Upon reversal of such judgment by a court having jurisdiction, the department, upon receipt of a certified copy of such judgment or order of reversal, shall vacate its order of revocation or annulment.

"2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the

mittee on Grievances of the Department of Education and the Board of Regents of the University of the State of New York. In the present instance, the violation of § 6514-2 (b) is obvious. The real problem for the state

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provisions and procedure of this article upon decision after due hearing in any of the following cases:

“(a) That a physician, osteopath or physiotherapist is guilty of fraud or deceit in the practice of medicine, osteopathy or physiotherapy or in his admission to the practice of medicine, osteopathy or physiotherapy; or

“(b) That a physician, osteopath or physiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or

“(c) That a physician, osteopath or physiotherapist is an habitual drunkard, or is or has been addicted to the use of morphine, cocaine or other drugs having similar effect, or has become insane; or

“(d) That a physician, osteopath or physiotherapist offered, undertook or agreed to cure or treat disease by a secret method, procedure, treatment or medicine or that he can treat, operate and prescribe for any human condition by a method, means or procedure which he refuses to divulge upon demand to the committee on grievances; or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio, or magazines; or

“(e) That a physician, osteopath or physiotherapist did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion or to procure the performance of the same by another or to violate section eleven hundred forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.

“(f) That a physician, osteopath or physiotherapist has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including x-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, x-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physio-

agencies is that of the appropriate disciplinary action to be applied.

The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission. The issue is not before us but it has not been questioned that the State could make it a condition of admission to practice that applicants shall not have been convicted of a crime in a court of competent jurisdiction either within or without the State of New York. It could at least require a disclosure of such convictions as a condition of admission and leave it to a competent board to determine, after opportunity for a fair hearing, whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice in the light of all material circumstances before the board.

It is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection. Appellant contends, however, that the standard which New York has adopted exceeds reasonable supervision and deprives him of property rights in his license and his established practice, without due process of law in violation of the Fourteenth Amendment.

He argues that New York's suspension of his license because of his conviction in a foreign jurisdiction, for an

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therapy or other therapeutic service or equipment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment. . . ."

offense not involving moral turpitude <sup>10</sup> and not criminal under the law of New York, so far transcends that State's legitimate concern in professional standards as to violate the Fourteenth Amendment. We disagree and hold that New York's governmental discretion is not so restricted.

This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder.<sup>11</sup> Realizing the importance of high standards of character and law observance on the part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically. It accordingly has sought to attain its justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner.

Section 6515 of the New York Education Law thus meets the charge of unreasonableness. All charges are passed upon by a Committee on Grievances of the department. That committee consists of ten licensed physicians, appointed by the Board of Regents. The term of each member is five years. They serve without compensation. Three are "members of conspicuous professional standing" appointed upon the board's own nomination. § 6515-2. The others are appointed from lists of nominees submitted respectively by the New York State Medical, Homeopathic and Osteopathic Societies.

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<sup>10</sup> See *Sinclair v. United States*, 279 U. S. 263, 299.

<sup>11</sup> A conviction for a crime which, under the law of New York, would amount to a felony has been given such an automatic effect in some instances. See McKinney's N. Y. Laws, Education Law, § 6613-12, as to dentists and McKinney's N. Y. Laws, Judiciary Law, § 90-4, as to attorneys. Cf. § 6514-1, note 9, *supra*, as to physicians. See *In re Raab*, 156 Ohio St. 158, 101 N. E. 2d 294.

Charges must be filed in writing and a subcommittee of three or more members hears and reports on them. At least ten days' notice of a hearing is required and opportunity is afforded the accused to appear personally, or by counsel, with the right to produce witnesses and evidence on his own behalf, to cross-examine witnesses, to examine evidence produced against him and to have subpoenas issued by the committee. The subcommittee transmits its report, findings and recommendation, together with a transcript of evidence, to the Committee on Grievances. That committee may take further testimony. It determines the merit of the charges and, if the practitioner is found guilty by a unanimous verdict, the record, together with the findings and determination of the committee, is transmitted to the Board of Regents. That board, "after due hearing," may accept or modify the committee's recommendation, or find the practitioner not guilty and dismiss the charges. § 6515-7. "The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same." § 6515-5. If the accused is found guilty, he may institute proceedings for review under Article 78 of the Civil Practice Act, returnable before the Appellate Division of the Third Judicial Department.

The above provisions, on their face, are well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of health.

The statutory procedure as above outlined has been meticulously followed in this case and no objection is made on that score. Appellant, nevertheless, complains that, as construed and applied by the Medical Committee on Grievances and its subcommittee, his hearing violated the due process of law required by the Fourteenth Amendment. He contends that evidence was introduced which

was immaterial and prejudicial and that the committee based its determination upon that evidence. He contends, in effect, that the committee reached its determination without "sufficient legal evidence to sustain the same," thus exceeding its statutory authority. He claims further that the committee acted capriciously and arbitrarily upon immaterial and prejudicial evidence, thus not only exceeding its statutory authority but depriving him of his property without due process of law.

The state courts have determined that the hearing did not violate the statute and, accordingly, we are concerned only with the constitutional question. The claim is that immaterial and prejudicial evidence of the alleged subversive activities of the Refugee Committee was introduced and relied upon. Emphasis is given to evidence that the Refugee Committee had been placed on the Attorney General's list of subversive or Communistic organizations. To emphasize the prejudicial character of this testimony, appellant refers to the fact that, at the time of the subcommittee hearing, litigation involving such list was pending in the courts and had resulted in a decision adverse to appellant, whereas that decision subsequently was set aside by this Court.<sup>12</sup> The State's answer to these claims is that such testimony was invited by appellant's own testimony as to the activities of the Refugee Committee.<sup>13</sup> The State shows also that while such evidence was not necessary to establish appellant's violation of the federal statute as to the subpoenaed

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<sup>12</sup> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.

<sup>13</sup> The character of the activities of the Joint Anti-Fascist Refugee Committee was placed in issue by appellant's amended answer. He volunteered much testimony as to the benevolent and charitable programs in which the committee participated and he introduced many exhibits on the same subject. Reference to the Attorney General's list of subversives developed naturally during the resulting cross-examination of appellant.

papers, it was material and admissible to assist the Committee on Grievances and the other agencies in determining the appropriate disciplinary measures to be applied to appellant under the state law. Appellant recognized this materiality by endeavoring to use evidence as to the Refugee Committee's charitable activities to justify and excuse his failure to produce the subpoenaed papers.

We find nothing sufficient to sustain a conclusion that the Board of Regents or the recommending committees made an arbitrary or capricious decision or relied upon irrelevant evidence. The report made by the original subcommittee of three that heard the evidence indicates that it was not influenced by the character of the Refugee Committee. It said:

"We do not feel that we are now concerned, nor would we be able to determine, whether the books and records of that Committee would disclose whether the Committee was completely philanthropic in character, or whether it was engaged in subversive activities."

The painstaking complete review of the evidence and the issues by the Committee on Discipline of the Board of Regents demonstrates a high degree of unbiased objectivity. Before the final action of the Board of Regents, the Committee on Discipline in its report to that board noted that—

"After the hearing below and the determination of the Medical Committee on Grievances, the Supreme Court of the United States reversed an order of the District Court dismissing a complaint by the Refugee Committee in an action by it for declaratory and injunctive relief (*Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 341 U. S. 123), some of the majority justices going on the ground that a determination of this kind could not constitu-

tionally be made without a hearing and opportunity to offer proof and disproof. In view of this decision, no evidentiary weight can be given in the present proceeding to the listing by the Attorney General."

That committee thus recognized the existence of a valid basis for disciplinary action but found "no valid basis for discipline beyond the statutory minimum of censure and reprimand." With this recommendation before the Board of Regents, we see no reason to conclude that the board disregarded it or acted arbitrarily, capriciously or through prejudice and deprived appellant of due process of law. The board made no specific findings. It accepted and sustained the unanimous determination of the Medical Committee on Grievances, which was that appellant was guilty. Then, in compliance with the recommendation of that committee, it fixed the measure of discipline at a six months' suspension of appellant's registration as a physician.

The Court has considered the other points raised by appellant but finds no substantial federal constitutional objection in them, even assuming that they are before us as having been considered by the Court of Appeals, although not mentioned in its opinion or the amendment to its remittitur.

The judgment of the Court of Appeals of the State of New York, accordingly, is

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

No. 69.—OCTOBER TERM, 1953.

Dr. Edward A. Barsky, Appellant,  
v.  
The Board of Regents of the  
University of the State of New  
York. } On Appeal From the  
Court of Appeals of  
the State of New  
York.

[April 26, 1954.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

Dr. Barsky has been a practicing physician and surgeon since his graduation from the medical college of Columbia University in 1919, except for time spent doing postgraduate work in Europe. Beginning with his internship he has been almost continuously on the staff of Beth Israel Hospital in New York, the city of his birth. During the Spanish Civil War Dr. Barsky and others became actively concerned with the medical needs of Loyalist soldiers. The doctor went over to Spain to head an American hospital for the Loyalist wounded. Following his return to practice in New York, Dr. Barsky became chairman of the Joint Anti-Fascist Refugee Committee, an organization founded in 1942 to help with problems of Spanish refugees from the Franco government. In 1945 the House Committee on Un-American Activities began an investigation of the Refugee Committee to see if it was spreading political propaganda. Dr. Barsky and other members of the organization's executive board were summoned before the congressional Committee and asked to produce the records of contributions and disbursements of the Refugee Committee. Dr. Barsky and the others refused, explaining that many contributors had relatives in Spain whose lives might be endangered if the contributors' names were

given out publicly. Instead, the organization was willing to give the required information to the President's War Relief Control Board. In making his refusal, Dr. Barsky had the advice of attorneys that his action was justified because the congressional Committee's subpoena transcended its constitutional powers. Concededly this advice was reasonable and in accord with the legal opinion of many lawyers and jurists throughout the country.<sup>1</sup> Moreover, the Refugee Committee was advised that the only way to raise its constitutional claim and test the subpoena's validity was for its executives to risk jail by refusing to produce the requested papers. Dr. Barsky was sentenced to six months in jail as punishment for his disobedience of the order to produce, and the Court of Appeals affirmed his sentence, overruling his constitutional arguments. This Court denied certiorari without approving or disapproving the constitutional contentions. 334 U. S. 843.

When Dr. Barsky was released from jail and ready to resume his practice, an agent of the Board of Regents of the University of the State of New York<sup>2</sup> served him with a complaint demanding that his license to practice medicine be revoked. This action was not based on any alleged failing of Dr. Barsky in his abilities or conduct as a physician or surgeon. The sole allegation was that he had been convicted of a crime—refusal to produce papers before Congress. New York law authorizes revocation

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<sup>1</sup> And certainly since our recent holding in *United States v. Rumely*, 345 U. S. 41, it cannot be said that it is "fanciful or factitious" to claim that the First Amendment bars congressional committees from seeking the names of contributors to an organization alleged to be engaged in "political propaganda."

<sup>2</sup> The University of the State of New York is the historic name of the corporate body which the Regents make up. It has no faculty or students of its own. See McKinney's N. Y. Laws, Education Law, § 201 *et seq.*

or suspension of a physician's license if he is convicted of a crime. Hearings were held before a Grievance Committee of physicians appointed by the Regents, and there was much testimony to the effect that Dr. Barsky was both a skillful surgeon and a good citizen. No witness testified to any conduct of Dr. Barsky which in any way reflected on his personal or professional character. Nothing was proven against him except that he had refused to produce papers. In reviewing the findings of fact, pursuant to § 211 of the State's Education Law, the Regents' Discipline Committee reported that Dr. Barsky's refusal to produce the Refugee Committee's papers was shown to be due to a desire to preserve the constitutional rights of his organization, that his offense involved no moral turpitude whatever,<sup>3</sup> and that he had already been punished. The right to test the constitutional power of a Committee is itself a constitutionally protected right in this country.<sup>4</sup> But despite all these things the Regents suspended Dr. Barsky's medical license for six months, giving no reason for their action.

I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is, as MR. JUSTICE DOUGLAS shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any state to deprive a person of liberty or property without due process of law. Accordingly, we brought this case here to determine if New York's action against Dr. Barsky violates the requirements of the Federal Constitution.

<sup>3</sup> This Court has authoritatively construed the federal offense of refusing to comply with a congressional subpoena as involving no moral turpitude. *Sinclair v. United States*, 279 U. S. 263, 299.

<sup>4</sup> See *Ex parte Young*, 209 U. S. 123, 148, and *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 335-338.

This record reveals, in my opinion, that New York has contravened the Constitution in at least one, and possibly two respects. First, it has used in place of probative evidence against Dr. Barsky an attainder published by the Attorney General of the United States in violation of the Constitution. Second, it has permitted Dr. Barsky to be tried by an agency vested with intermingled legislative-executive-judicial powers so broad and so devoid of legislative standards or guides that it is in effect not a tribunal operating within the ordinary safeguards of law but an agency with arbitrary power to decide, conceivably on the basis of suspicion, whim or caprice, whether or not physicians shall lose their licenses.

*First.* At the hearing before a subcommittee of the Medical Grievance Committee, appointed by the Regents, the lawyer for the Regents introduced evidence that the Refugee Committee headed by Dr. Barsky had been listed by the Attorney General of the United States as subversive. Pages and pages of the record are devoted to this listing, to arguments about its meaning and to other innuendoes of suspected Communistic associations of Dr. Barsky without a single word of legal or credible proof. Excerpts from the record are printed in the Appendix to this opinion. The Grievance Committee made a formal finding of fact that the Refugee Committee had been listed as subversive. This Court, however, has held that the Attorney General's list was unlawful, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. My view was and is that the list was the equivalent of a bill of attainder which the Constitution expressly forbids. The Regents' own reviewing Committee on Discipline recognized the illegality of the list and advised the Regents that no weight should be given to it. This reviewing committee also recommended that the Regents not accept the Grievance Committee's recommendation of a six months' suspension

but instead give no suspension at all. The Regents, however, accepted and sustained the determination of the Grievance Committee. Dr. Barsky sought review in the Court of Appeals, but New York's highest court said it was without power to review the use of the Attorney General's list. Our responsibility is, however, broader. We must protect those who come before us from unconstitutional deprivation of their rights, whether the state court is empowered to do so or not. The record shows that the Grievance Committee made a finding of fact that "Ever since 1947, the [Refugee] Committee has been listed as subversive by the Attorney General of the United States." It seems perfectly natural for the Grievance Committee to rely on this list, for the Regents are charged with the duty of making up their own list of "subversive" organizations for the purpose of dismissing teachers, and New York law authorizes the Regents to make use of the Attorney General's list.<sup>5</sup> Dr. Barsky had a constitutional right to be free of any imputations on account of this illegal list. That reason alone should in my judgment require reversal of this case.

*Second.* Even if the evidence considered by the Regents and the Grievance Committee had been proper, I would still have grave doubts that Dr. Barsky was tried by procedures meeting constitutional requirements. The Regents who tried and suspended him exercise executive, legislative and judicial powers.<sup>6</sup> The Regents

<sup>5</sup> Education Law, § 3022. See *Adler v. Board of Education of the City of New York*, 342 U. S. 485.

<sup>6</sup> The New York Constitution, Art. 5, § 4, makes the Regents head of the Department of Education with power to appoint and remove at pleasure a Commissioner of Education who is the Department's chief administrative officer. These nonsalaried Regents are almost entirely independent of the Governor, being elected on joint ballot of the two houses of the Legislature for thirteen-year terms. Education Law, § 202. Executive power over the State's educational system is vested in the Regents by § 101 of the Education Law. Section 207 provides

have broad supervisory and disciplinary controls over schools, school boards and teachers. They also have powers over libraries and library books, and they censor movies.<sup>7</sup> Doctors, dentists, veterinarians, accountants, surveyors, and other occupational groups are also subject to discipline by the Regents and must obey their rules.<sup>8</sup> For example the Department of Education, headed by the Regents, has its own investigators, detectives and lawyers to get evidence and develop cases against doctors.<sup>9</sup> Persons appointed by the Department prefer charges and testify against an accused before a committee of doctors appointed by the Regents. This committee after hearing evidence presented by departmental prosecutors makes findings and recommendations which are reviewed by another Regents' committee with power to make its own findings and recommendations. Then the Regents themselves, apparently bound in no way by the recommendations of either of their committees, make the final decision as to doctors' professional fate.

A doctor is subject to discipline by the Regents whenever he is convicted of a "crime" within or without the

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that "the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state. . . ."

<sup>7</sup> See Education Law, §§ 120 *et seq.*, 214, 215, 216, 219, 224, 245 *et seq.*, 704, 801 *et seq.* On motion picture censorship by the Regents see *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495.

<sup>8</sup> Education Law, §§ 211, 6501-7506. The professions of pharmacy, optometry, podiatry, nursing, shorthand reporting, architecture and engineering are also under the Regents' jurisdiction.

<sup>9</sup> For examples of entrapment of doctors by the Regents' investigators and the narrowness of judicial review afforded accused doctors see *Weinstein v. Board of Regents*, 267 App. Div. 4, 44 N. Y. S. 2d 917, reversed, 292 N. Y. 682; *Application of Epstein*, 267 App. Div. 27, 44 N. Y. S. 2d 921, reversed, 295 N. Y. 154.

State. Whether his "crime" is the most debasing or the most trivial, the Regents have complete discretion to impose any measure of discipline from mere reprimand to full revocation of the doctor's license.<sup>10</sup> No legislative standards fetter the Regents in this respect. And no court in New York can review the exercise of their "discretion," if it is shown that the Regents had authority to impose any discipline at all.<sup>11</sup> Should they see fit to let a doctor repeatedly guilty of selling narcotics to his patients continue to practice, they could do so and at the same time bar for life a doctor guilty of a single minor infraction having no bearing whatever on his moral or professional character. They need give no reasons. Indeed the Regents might discipline a doctor for wholly indefensible reasons, such as his race, religion or suspected political beliefs, without any effective checks on their decisions.

In this case one can only guess why the Regents overruled their Discipline Committee and suspended Dr. Barsky. Of course it may be possible that the Regents thought that *every* doctor who refuses to testify before a congressional committee should be suspended from practice.<sup>12</sup> But so far as we know the suspension may rest on the Board's unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents' action, would indicate that in New York a doctor's right to practice rests on no more

<sup>10</sup> *Barsky v. Board of Regents*, 305 N. Y. 89, 99.

<sup>11</sup> The Regents, with their many law-enforcement duties, are plainly not a judicial body in the ordinary sense, yet court review is virtually precluded. Whether due process of law can be satisfied in this type of case by procedures from which effective review by the regular judicial branch of the government is barred is certainly not wholly clear. Compare *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, *Ng Fung Ho v. White*, 259 U. S. 276 and *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, with *Yakus v. United States*, 321 U. S. 414.

<sup>12</sup> But see note 7 of the Courts' opinion.

than the will of the Regents. This Court, however, said many years ago that "the nature and theory of our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails . . ." *Yick Wo v. Hopkins*, 118 U. S. 356, 369-370.<sup>13</sup>

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<sup>13</sup> See *Davis v. Schnell*, 81 F. Supp. 872, where in an opinion by Mullins, D. J., a three-judge district court, following *Yick Wo v. Hopkins*, struck down a state constitutional provision limiting voters to those who could "understand and explain" the Constitution. County Boards of Registrars were by statute given discretion to determine whether persons seeking to vote had satisfied the constitutional provision. Judge Mullins said:

"The words 'understand and explain' do not provide a reasonable standard. A simple test may be given one applicant; a long, tedious, complex one to another; one applicant may be examined on one article of the Constitution; another may be called upon to 'understand and explain' every word and article and provision of the entire instrument.

"To state it plainly, the sole test is: Has the applicant by oral examination or otherwise understood and explained the Constitution to the satisfaction of the particular board? To state it more plainly, the board has a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered. To state it even more plainly, the board, by the use of the words 'understand and explain' is given the arbitrary power to accept or reject any prospective elector that may apply . . . Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment . . ." 81 F. Supp., at 878. This Court affirmed without writing an opinion of its own. 336 U. S. 933.

## APPENDIX TO OPINION OF MR. JUSTICE BLACK.

At the hearing before the Subcommittee of the Medical Grievance Committee there was a great deal of testimony as to the nature and purposes of the Joint Anti-Fascist Refugee Committee. Mr. Tartikoff, assistant attorney general of New York, representing the Department of Education, repeatedly attempted to show that the Committee had engaged in "subversive" or "Un-American" activities. However, he presented no probative evidence tending to prove this allegation. Finally, Mr. Tartikoff sought to bring out that the Committee had been listed by the Attorney General of the United States as "subversive." Excerpts from the record of his questioning of Dr. Barsky on this point are quoted below.

"**MR. TARTIKOFF:** resuming—

"Q. Doctor, is it not a fact that on or about November 24, 1947, the Attorney General of the United States, in pursuance of a directive contained in an executive order of the President of the United States listed and published a classification of organizations deemed to be subversive and Un-American, and that included amongst those organizations at that time by the Attorney General deemed to be subversive and Un-American was the Joint Anti-Fascist Refugee Committee?"

At this point Mr. Fishbein, Dr. Barsky's attorney, objected to the question. After a brief colloquy between counsel the record continues:

"**MR. TARTIKOFF:** I think this committee is entitled to know whether this organization is listed by the Attorney General of the United States as being subversive and Un-American, particularly in light of Dr. Barsky's testimony that the activity of the organization since its inception in 1942 down to and including all through 1950 has been substantially the same during that period of time."

After further discussion:

"MR. TARTIKOFF: You have introduced document after document to show this is one of the finest organizations in the world. I think I am entitled to counter that with evidence that the Attorney General of the United States reviewed the activities of this organization in whatever fashion he is supposed to review it and has come to an opposite conclusion."

Shortly after, Dr. Shearer, the subcommittee chairman, overruled Mr. Fishbein's objection, and the hearing proceeded as follows:

"MR. TARTIKOFF: resuming—

"Q. Was it so listed, Dr. Barsky?

"A. Mr. Tartikoff, the attorney—

"Q. Question: Was it so listed? That can take a "yes" or "no" answer.

"A. I just would like to bring up—

"MR. TARTIKOFF:

"I ask the committee to direct him to answer that question "yes" or "no."

"CHAIRMAN SHEARER: "Yes" or "no," Doctor Barsky.

"A. If I may for a moment,—off the record—

"Q. Doctor, will you please answer the question?

"A. The answer to the question is "yes."

"Q. And was it not again so listed by the Attorney General of the United States in a release made on May 27, 1948?

"A. The answer is I really don't know. You have the statement.

"Q. If I tell you that the statement so indicates, would you dispute it?

"A. I certainly would not, Mr. Tartikoff.

"Q. And isn't it a fact that it was again so listed on April 21, 1949, July 20, 1949, September 26, 1949, August 24, 1950, and September 5, 1950?

"A. I think you brought out the same list, Mr. Tartikoff.

"Q. Well, there may have been additional ones added, for your information.

"A. I really don't remember.

"Q. And doctor, didn't you as chairman of the Joint Anti-Fascist Refugee bring a proceeding against the Attorney General in the United States courts?

"A. Yes, sir.

"Q. To restrain him from listing your organization as subversive?

"A. Yes, sir.

"And isn't it a fact that the Circuit Court ruled against you on that on August 11, 1949?

"A. Yes, sir."

Later, after Dr. Barsky had asked the subcommittee not to "lay too much stress on the fact that this list was made," Mr. Tartikoff asked him these questions:

"Q. Wasn't there also an investigation in California by a Committee on Un-American Activities?

"A. The House Committee?

"Q. The Legislative Committee in California. A Legislative Committee of the State of California, and didn't they likewise list your organization as Communistic?

"A. What do you mean?

"Q. The California Committee on Un-American Activities, that's the Tenney Committee, did they list your organization as Communistic?

"A. I really don't know. If you have the record—"

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# SUPREME COURT OF THE UNITED STATES

No. 69.—OCTOBER TERM, 1953.

Edward A. Barsky, Appellant,  
v.  
Board of Regents of the  
University of the State of New  
York.

On Appeal From the  
Court of Appeals of  
the State of New  
York.

[April 26, 1954.]

MR. JUSTICE FRANKFURTER, dissenting.

I fully concur in substantial agreement with what is said in the Court's opinion, I am constrained to dissent because of what is left unsaid.

Appellant's suspension from the practice of medicine was based on his conviction for refusing to turn over to the American Activities Committee of Congress documents of the Joint Anti-Fascist Refugee Committee, an organization of which appellant was Chairman. The Medical Subcommittee on Grievances of the New York Board of Regents, which held the original hearing in the disciplinary proceeding now before us, allowed counsel for the Regents to introduce evidence that this Joint Anti-Fascist Refugee Committee was in 1947 listed by the Attorney General of the United States as a subversive organization, and the Subcommittee accordingly made a specific finding to this effect in its report. This evidence was obviously irrelevant to the issue before the Committee—whether appellant had been convicted of a crime—but was also obviously extremely prejudicial to appellant. The Regents Committee on Discipline, reviewing the Grievance Committee, commented as follows on this matter:

"There is, it should be noted, evidence in the record, and reliance on that evidence in the findings of the

Medical Committee on Grievances, that the Refugee Committee had been listed as Communist in the list furnished by the Attorney General of the United States . . . . In view of [the decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123], no evidentiary weight can be given in the present proceeding to the listing by the Attorney General."

The Committee on Discipline concluded that appellant should not be suspended for six months, as the Grievance Committee had recommended, but should only be reprimanded. In face of this recommendation, the Board of Regents, without stating any reasons, accepted the decision of the Grievance Committee and ordered appellant suspended for a period of six months from his right to practice medicine.

When this question came before the New York Court of Appeals, that Court disposed of the issue as follows:

"As to the assertions, by appellants . . . that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such questions . . . ."  
305 N. Y. 89, 99.

Thus the highest court of the State of New York tells us, in effect, "Yes, it may be that the Regents arbitrarily deprived a doctor of his license to practice medicine, but the courts of New York can do nothing about it." Such a rule of law, by denying all relief from arbitrary action, implicitly sanctions it; and deprivation of interests that are part of a man's liberty and property, when based on such arbitrary grounds, contravenes the Due Process Clause of the Fourteenth Amendment.

Of course a State must have the widest leeway in dealing with an interest so basic to its well-being as

the health of its people. This includes the setting of standards, no matter how high, for medical practitioners, and the laying down of procedures for enforcement, no matter how strict. The granting of licenses to practice medicine and the curtailment or revocation of such licenses may naturally be entrusted to the sound discretion of an administrative agency. And while ordinary considerations of fairness and good sense may make it desirable for a State to require that the revocation or temporary suspension of a medical license be justified by stated reasons, the Due Process Clause of the Fourteenth Amendment does not lay upon the States the duty of explaining presumably conscientious action by appropriate State authorities. *Douglas v. Noble*, 261 U. S. 165, 169-170. Reliance on the good faith of a state agency entrusted with the enforcement of appropriate standards for the practice of medicine is not in itself an investiture of arbitrary power offensive to due process. Likewise there is nothing in the United States Constitution which requires a State to provide for judicial review of the action of such agencies. Finally, when a State does establish some sort of judicial review, it can certainly provide that there be no review of agency discretion, so long as that discretion was exercised within the gamut of choices, however extensive, relevant to the purpose of the power given the administrative agency. So far as concerns the power to grant or revoke a medical license, that means that the exercise of the authority must have some rational relation to the qualifications required of a practitioner in that profession.

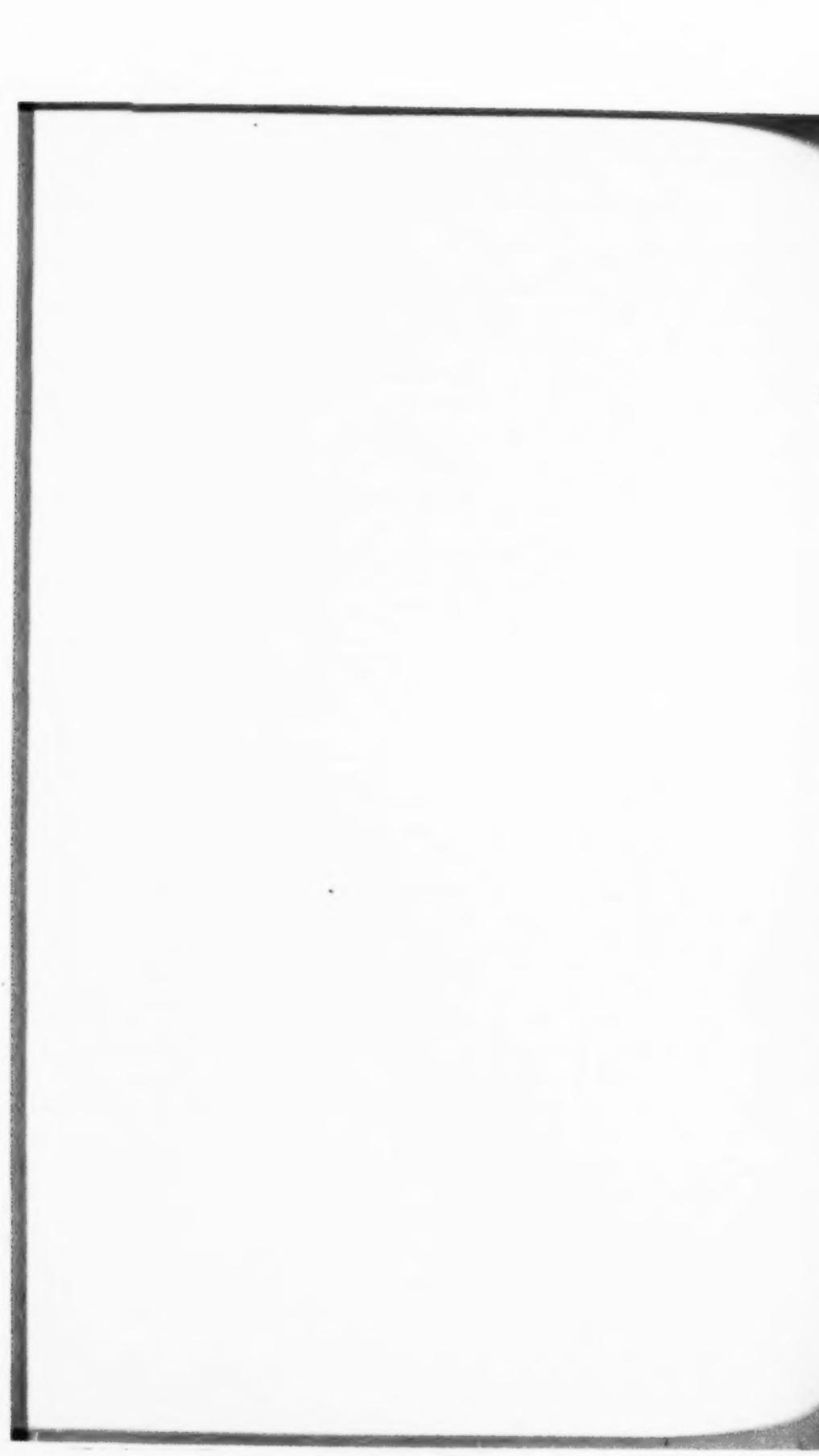
It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his pro-

fession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is red-headed or because he was divorced, except for a calling, if such there be, for which red-headedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids. See *Perkins v. Elg*, 307 U. S. 325, 349-350; also *Rex v. Northumberland Compensation Appeal Tribunal*, [1951] 1 K. B. 711. The limitation against arbitrary action restricts the power of a State "no matter by what organ it acts." *Missouri v. Dockery*, 191 U. S. 165, 171.

If the Regents had explicitly stated that they suspended appellant's license or lengthened the time of the suspension because he was a member of an organization on the so-called Attorney General's list, and the New York Court of Appeals had declared that New York law allows such action, it is not too much to believe that this Court would have felt compelled to hold that the Due Process Clause disallows it. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 104 F. Supp. 567. Yet that is precisely what we may have here. It bears repeating that the Court of Appeals, the ultimate voice of New York law, found itself impotent to give relief on appellant's claim that the Regents "in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration." 305 N. Y. 89, 99. At the very least, for all that appears, the Court of Appeals assumed that the Regents relied "on matters not proper for consideration." Thus the appellant may have been deprived of the liberty to practice his profession and of his property in-

terests in his profession in contravention of due process. This is not a merely abstract possibility. The "punishment"—the Court of Appeals so characterized it—recommended by the Grievance Committee rested certainly in part on arbitrary considerations, and the Board of Regents appears to have adopted this tainted "determination." Since the decision below may rest on a constitutionally inadmissible ground, the judgment should not stand. *Stromberg v. California*, 283 U. S. 359, 368; *Williams v. North Carolina*, 317 U. S. 287, 292.

I would return this case to the New York authorities for reconsideration in light of the views here expressed.



# SUPREME COURT OF THE UNITED STATES

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[April 26, 1954.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Mr. Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts, coined a dictum that has pernicious implications. "The petitioner may have a constitutional right to talk politics," he said, "but he has no constitutional right to be a policeman." See *McAu-liffe v. New Bedford*, 155 Mass. 216, 220, 29 N. E. 517. By the same reasoning a man has no constitutional right to teach, to work in a filling station, to be a grocery clerk, to mine coal, to tend a furnace, or to be on the assembly line. By that reasoning a man has no constitutional right to work.

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

The dictum of Holmes gives a distortion to the Bill of Rights. It is not an instrument of dispensation but one of deterrents. Certainly a man has no affirmative right to any particular job or skill or occupation. The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.

The Bill of Rights prevents a person from being denied employment as a teacher who though a member of a "subversive" organization is wholly innocent of any unlawful purpose or activity. *Wieman v. Updegraff*, 344 U. S. 183. It prevents a teacher from being put in a lower salary scale than white teachers solely because he is a Negro. *Alston v. School Board*, 112 F. 2d 992. Those cases illustrate the real significance of our Bill of Rights.<sup>1</sup>

So far as we can tell on the present record, Dr. Barsky's license to practice medicine has been suspended, not because he was a criminal, not because he was a Communist, not because he was a "subversive," but because he had certain unpopular ideas and belonged to and was an officer of the Joint Anti-Fascist Refugee Committee, which was included in the Attorney General's "list." If, for the same reason, New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat,

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<sup>1</sup> As to the right to work, see also *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *Takahashi v. Fish and Game Commission*, 334 U. S. 410.

it does a man little good to stay alive and free and propertied, if he cannot work.

The distinction between the State's power to license doctors and to license street vendors is one of degree. The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law. In this case it is admitted that Dr. Barsky's "crime" consisted of no more than a justifiable mistake concerning his constitutional rights.<sup>2</sup> Such conduct is no constitutional ground for taking away a man's right to work. The error is compounded where, as here, the suspension of the right to practice has been based on Dr. Barsky's unpopular beliefs and associations. As Judge Fuld, dissenting in the New York Court of Appeals, makes clear, this record is "barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients."

Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights. So far as I know, nothing in a man's political beliefs disables him from setting broken bones or remov-

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<sup>2</sup> Dr. Barsky was convicted for failure to produce certain documents subpoenaed by a congressional committee. At a hearing before the Regents' Committee on Discipline the Assistant Attorney General representing the State conceded that Dr. Barsky had acted on the advice of counsel. He conceded that "the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part." The advice given was that the subpoenas were unconstitutionally issued and that Dr. Barsky was not legally required to respond. The Assistant Attorney General admitted that this opinion was held by many lawyers and by some judges. The Committee on Discipline pointed out that refusal to produce the subpoenaed records was "the only method by which the legal objections to the Congressional Committee's course could be judicially determined."

ing ruptured appendixes, safely and efficiently. A practicing surgeon is unlikely to uncover many state secrets in the course of his professional activities. When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us.

